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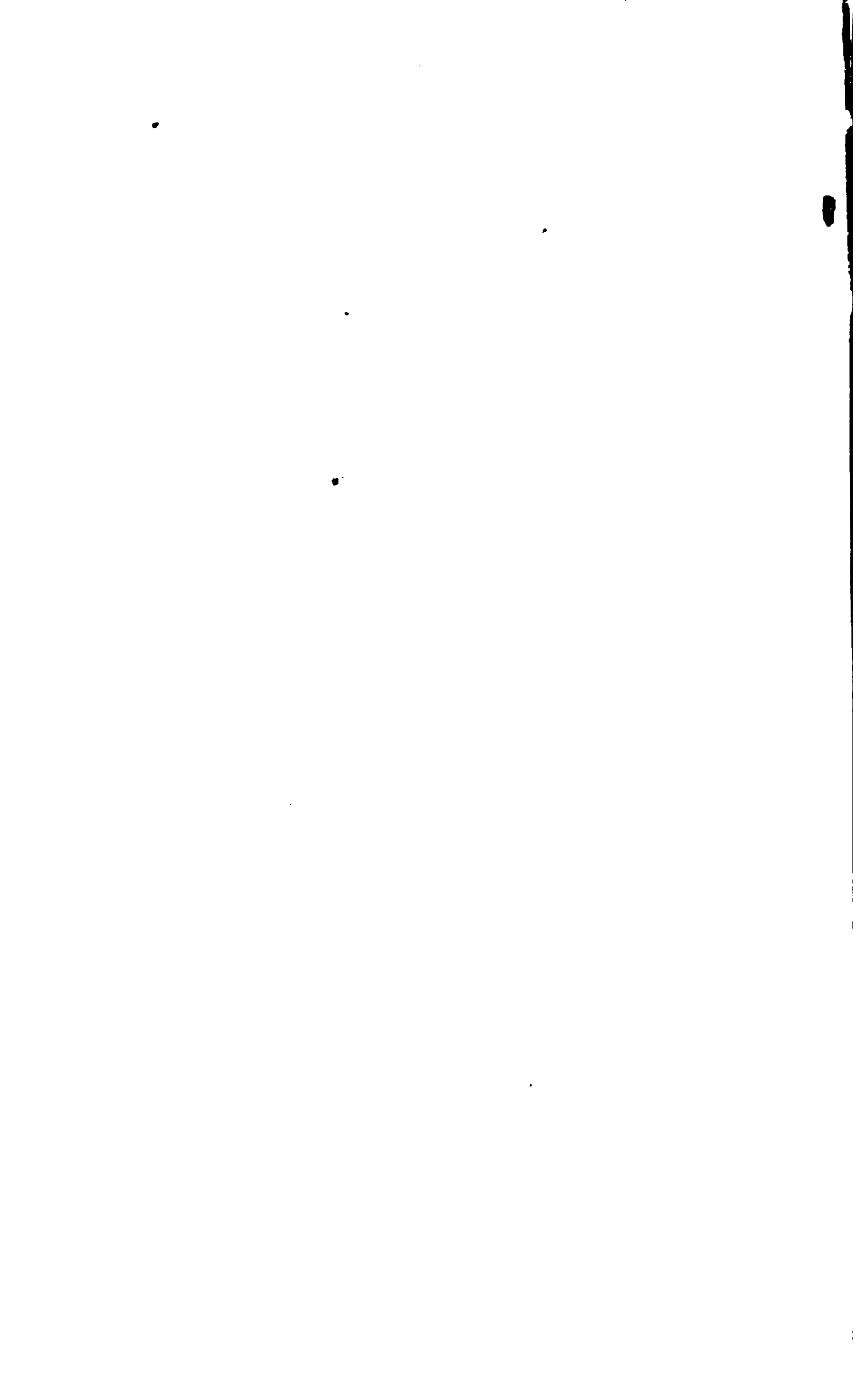












**REPORT OF CASES**  
**ARGUED AND DETERMINED IN THE**  
**SUPREME COURT**  
**OF THE**  
**TERRITORY OF ARIZONA**

**FROM 1889 TO 1892, INCLUSIVE**

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**E. W. LEWIS**  
**REPORTER**

---

**VOLUME THREE**

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**SAN FRANCISCO**  
**BANCROFT-WHITNEY COMPANY**

**LAW PUBLISHERS AND LAW BOOKSELLERS**

**1904**

40/221  
553

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*Rec. June 28, 1904.*

# **SUPREME COURT.**

---

1889.

**JAMES H. WRIGHT**, Chief Justice,  
**W. W. PORTER**, Associate Justice,  
**W. H. BARNES**, Associate Justice.

## **OFFICERS OF THE COURT.**

**OWEN T. ROUSE**.....U. S. District Attorney  
**W. K. MEADE**.....U. S. Marshal  
**CLARK CHURCHILL** .....Attorney-General  
**WILLIAM WILKERSON** .....Clerk

## **SUPREME COURT—Continued.**

---

1890-1891.

**JAMES H. WRIGHT**, Chief Justice,  
**HENRY C. GOODING**, Chief Justice,<sup>1</sup>  
**JOSEPH H. KIBBEY**, Associate Justice,  
**RICHARD E. SLOAN**, Associate Justice,  
**EDMUND W. WELLS**, Associate Justice.<sup>2</sup>

### **OFFICERS OF THE COURT.**

**H. R. JEFFORDS**.....U. S. District Attorney  
**W. K. MEADE**.....U. S. Marshal  
**ROBERT H. PAUL**.....U. S. Marshal<sup>3</sup>  
**CLARK CHURCHILL** .....Attorney-General  
**WILLIAM HERRING** .....Attorney-General<sup>4</sup>  
**J. E. WALKER**.....Clerk

<sup>1</sup> Qualified May 7, 1890.

<sup>2</sup> Qualified March 5, 1891.

<sup>3</sup> Qualified January 14, 1891.

<sup>4</sup> Qualified March 13, 1891.

## **SUPREME COURT—Continued.**

---

1892.

**HENRY C. GOODING**, Chief Justice,  
**JOSEPH H. KIBBEY**, Associate Justice,  
**RICHARD E. SLOAN**, Associate Justice,  
**EDMUND W. WELLS**, Associate Justice.

### **OFFICERS OF THE COURT.**

**THOMAS F. WILSON**.....U. S. District Attorney  
**ROBERT H. PAUL**.....U. S. Marshal  
**WILLIAM HERRING** .....Attorney-General  
**J. E. WALKER**.....Clerk  
**THOMAS D. HAMMOND**.....Clerk<sup>1</sup>

<sup>1</sup> Qualified January 27, 1892.





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**REPORTS OF CASES**  
**DETERMINED IN**  
**THE SUPREME COURT**  
**OF THE**  
**TERRITORY OF ARIZONA**  
**DURING THE YEAR 1889.**

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[Criminal No. 45. Filed January 18, 1889.]

[20 Pac. 94.]

**THE TERRITORY OF ARIZONA, Plaintiff and Respon-**  
**dent, v. P. F. CLANTON, Defendant and Appellant.**

1. **JURY—SPECIAL VENIRES—REV. STATS. ARIZ. 1887, SECS. 2175 ET SEQ., CONSTRUED.**—Where special venires are issued in term, directed to the sheriff to serve, and the names returned are properly put in the box, and drawn by the clerk, the proceedings are regular under statutes, *supra*, and the jury properly summoned.
2. **APPEAL AND ERROR—RECORD—BILL OF EXCEPTIONS—REVIEW OF EVIDENCE—INSTRUCTIONS.**—Where the bill of exceptions and the transcript show that the evidence is not all preserved in the record this court cannot pass upon questions of admissibility of evidence or errors in instructions. All the evidence must be before the court.
3. **SAME—ABSTRACT OF EVIDENCE.**—An abstract of all the evidence signed by the trial judge properly presents the evidence on appeal.
4. **WITNESSES—IMPEACHMENT—CONTRADICTION UPON IMMATERIAL MATTER—REV. STATS. 1887, SEC. 2055, CRIMINAL CODE, CITED.**—Where the prosecuting witness made affidavit of poverty under statute, *supra*, such affidavit, not being material to the issue, was inadmissible. A witness can be contradicted only upon a matter material to the issue.
5. **JURY—PROVINCE OF—REMARKS OF JUDGE.**—The remark of the judge, that the affidavit of the witness could not be considered as bearing upon his credibility, was the statement of the law, and in no way trespassed upon the province of the jury.

6. CRIMINAL LAW—MORAL CERTAINTY—REASONABLE DOUBT.—Proof to a moral certainty is not required in a criminal case. All reasonable doubt of defendant's guilt must be removed—no more.
7. SAME—WITNESS—VERACITY—CHARACTER—EVIDENCE—GENERAL REPUTATION—PROCEDURE REGULATED BY STATUTE IN FORCE AT TIME.—Confining proof of character of a witness to his general reputation in the neighborhood where he resided, for truth and veracity, is the common-law rule adopted by the new statute, and the course of procedure in criminal and civil trials is governed by the law in force at the time.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Apache. James H. Wright, Judge. Affirmed.

The facts are stated in the opinion.

W. Johnston, and C. L. Gutterson, for Appellant.

The court expressed an opinion as to the weight of evidence introduced by the defendant to impeach the character of the principal witness for the territory, A. G. Powell, which was error. "The court cannot *weigh evidence* and determine its *sufficiency* as a matter of law. The jury are the exclusive judges of the credibility of witnesses, the weight of testimony and the facts established, and the presumption of facts deducible from them." *People v. Smith*, 61 Cal. 248; *People v. Ybarra*, 17 Cal. 171; *People v. Welden*, 51 Cal. 590; *People v. Wong Ah Ngow*, 54 Cal. 153, 35 Am. Rep. 69; *People v. Lutherington*, 59 Cal. 598; *State v. McGinness*, 5 Nev. 280.

"The court cannot say that such a witness is biased or not, or that his testimony must be viewed with suspicion. *As a matter of law, the jury must weigh the evidence.*" *Kansas Pac. Ry. Co. v. Little*, 19 Kan. 270.

"Whether the presumption (i. e. that witness told the truth) is removed by evidence is a matter of which the jury are the exclusive judges." *People v. McLane*, 60 Cal. 413.

"It is not proper for a court to make remarks in the hearing of the jury calculated to influence their findings." *Skelly v. Roland*, 78 Ill. 438; *Fusdam v. Huntsville*, 54 Ala. 263; *Wannock v. Milwan*, 21 Wis. 217.

"The court may instruct the jury what is evidence, but not

what it proves." *Russ v. Steamboat*, 9 Iowa 374; *Thompson v. Hovey*, 43 Ill. 198.

"It is a familiar doctrine that it is the special province of the jury to judge of the weight and credibility of the evidence as establishing or not a particular fact in issue." Bishop's Criminal Procedure, 979; *Berry v. State*, 10 Ga. 511; *Noland v. State*, 19 Ohio, 131; *Ruther v. Co.*, 2 Met. (Ky.) 387; *Bill v. People*, 14 Ill. 432; *Newcomb v. State*, 37 Miss. 383; *Coates v. Elliott*, 23 Tex. 608.

As to the *ex post facto* feature of the court's construction of the statutes of 1887 as to evidence in this case, in *People v. Mortimer*, 46 Cal. 115, it is held that statutes which affect only matters of procedure are not *ex post facto*. What is "procedure"? It is defined by Bishop's Criminal Procedure, par. 2, vol. 1, 2d ed., which definition and its author are both approved in *King v. Missouri*, 107 U. S. 221, 222, 2 Sup. Ct. Rep. 443.

"In criminal cases the principles of law invoked by the defendant should be stated to the jury in clear and explicit terms, as the error is not cured by the fact that it was in substance given by the court." *People v. Ramirez*, 13 Cal. 173; *Waldie v. Dall*, 29 Cal. 561; *People v. Ramirez*, 56 Cal. 538; *People v. Hobson*, 17 Cal. 431; *People v. Kelly*, 28 Cal. 427, 428; *People v. Strong*, 30 Cal. 154, 158; *People v. Williams*, 32 Cal. 285.

John A. Rush, Attorney-General, for Respondent.

BARNES, J.—This cause was tried upon an indictment charging defendant with the crime of the larceny of a calf. Defendant was found guilty, and sentenced to a term of imprisonment. It is urged that the court erred in issuing the several special venires to fill up the panel of trial jurors without drawing the names, as required by section 2175 *et seq.* These venires were issued in term, were directed to the sheriff to serve, and the names returned by him were properly put in the box, and drawn by the clerk. The jury were properly summoned, and the proceedings were regular. Errors have been assigned as to the rulings of the court as to the admission of evidence, and also based upon the instructions of the court; and yet the bill of exceptions and the transcript show that the evidence is not all preserved in the record. It is

impossible to pass upon such questions unless all the evidence is before us. This may be and we think the better practice is to be effected by an abstract of all the evidence signed by the trial judge. We cannot see that an error was committed as to the admission or rejection of evidence, unless we can see what relation the evidence bears to the whole case. The same is true as to the instructions. All the evidence must be before us.

We have, however, looked into the bill of exceptions, which only purports to preserve a portion of the evidence, and find that error is assigned as to the admission of an affidavit of the prosecuting witness—that he was a poor person, to entitle him to his necessary expenses for attending as a witness upon the court, as is provided by section 2055 of the Criminal Code—offered by defendant. This affidavit was not competent evidence for any purpose. The witness was not swearing to any matter material to the issue before the jury, and he could be contradicted only upon a matter material to the issues. The remark of the judge that the affidavit of the witness could not be considered by the jury as bearing upon his credibility, was the statement of the law, and in no way trespassed upon the province of the jury.

The instructions laid down the law correctly. Proof to a moral certainty is not required in a criminal cause. All reasonable doubt of defendant's guilt must be removed; no more. See *Territory v. Barth*, 2 Ariz. 319, 15 Pac. Rep. 673.

The assignment of error that the court erred in confining proof of character to the general reputation of the witness Powell, to his general reputation in the neighborhood where he resided, for truth and veracity, is not tenable. The law is well settled that the course of procedure in criminal and civil trials is governed by the law in force at the time. The new statute having adopted the common-law rule on this subject, we think the ruling of the court was correct.

We see no error in the record, and the cause is affirmed.

[Civil No. 213. Filed January 19, 1889.]

[20 Pac. 310.]

**BOSTON AND ARIZONA SMELTING AND REDUCTION  
COMPANY, Plaintiff and Appellee, v. ROBERT A.  
LEWIS et al., Defendants and Appellants.**

1. **APPEAL AND ERROR—INCOMPETENT TESTIMONY—TRIAL BY COURT—  
PRESUMPTIONS—HARMLESS ERROR.**—In an appeal from a trial  
before the court, the court of last resort will look into the record  
to see if the conclusion is right after disregarding the incompetent  
testimony, assuming that the trial judge did not consider the same.  
Harmless error is not ground for reversal.
2. **SAME—WEIGHT OF EVIDENCE.**—Where there is competent evidence in  
a case to sustain the conclusions this court cannot consider its  
weight; that is for the trial court.

**APPEAL** from a judgment of the District Court of the  
First Judicial District in and for the County of Cochise.  
D. H. Pinney, Judge. Affirmed.

The facts are stated in the opinion.

Haynes & Mitchell, for Appellants.

There can be no doubt there was error in the admission of  
the testimony complained of. To prevent a reversal, therefore,  
it rests upon the respondent to show that we were not preju-  
diced; that the error was harmless; and this must be made  
to appear clearly. *Rice v. Neath*, 39 Cal. 609; *Sweeney v.*  
*Riley*, 42 Cal. 402; *Ponce v. McElvey*, 51 Cal. 459; *Innes*  
*v. Steamer Senator*, 1 Cal. 459; *Santillan v. Moses*, 1 Cal. 92.

W. H. Stilwell, for Appellee.

**PER CURIAM.**—This is a suit adverse to the application  
for a patent to a mineral claim, alleging that defendants,  
in their application for a patent to the Merry Christmas claim,  
had included a portion of the Knoxville claim. The pleadings  
attack the Knoxville location, alleging that it was not marked  
on the ground by monuments; also that, if ever properly  
located, it has been abandoned by failure to do annual assess-



ment work. The cause was tried by the court without a jury. The evidence is very voluminous, and very conflicting. We find in the record much testimony incompetent, because hearsay, admitted over the objections of defendants, and much testimony objectionable in character that seems to have been admitted, but not formally ruled upon. Had this cause been tried by a jury, a verdict rendered with this evidence before them could not stand. But, in appeals from a trial before the court, the court of last resort will look into the record to see if the conclusion is right after discarding the incompetent evidence; assuming that the trial judge did not consider the same. A harmless error will not be ground for reversal. We have to that end carefully examined this record, and conclude that the findings should not be disturbed. There is competent legal evidence to sustain the conclusions in this case, and we cannot consider its weight; that is for the trial court.

The judgment of the court below is affirmed.

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[Civil No. 234. Filed January 19, 1889.]

[20 Pac. 93.]

LOUIS JANTZON et al., Plaintiffs and Appellants, v. THE  
ARIZONA COPPER COMPANY, Defendant and Ap-  
pellee.

1. MINES AND MINING—LOCATION—CITIZENSHIP—PRESUMPTION FROM RESIDENCE.—It will be presumed that a resident of the United States who has made a mining location was a citizen.
2. SAME—LOCATION NOTICE—RECORDED—EVIDENCE—PRIMA FACIE TITLE.—Where it appears that a locator, at or near the time of location, recorded his location notice, reciting all the facts essential to a valid location, such evidence will make out a *prima facie* title.
3. SAME—MINING CLAIMS—POSSESSORY ACTIONS—EVIDENCE.—The rule in ejectment that the plaintiff must recover on the strength of his own title and not on the weakness of the defendant's, does not apply to possessory actions for mining claims. Each must prove his claim to the premises in dispute, and the better right prevails.
4. WITNESSES—CREDIBILITY.—The testimony of a witness who disputes his own record, made long before and at the time the acts recited

therein were reported as done, to discredit a title based thereon, should be disregarded as unworthy of belief.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Graham. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Jeffords & Franklin, for Appellants.

M. J. Egan, and Alexander Campbell, for Appellee.

PORTER, J.—This was an action in ejectment. Cause was tried by the court, and judgment rendered for the plaintiff. The title of plaintiff was asserted title to a mining claim called the "West Extension of the Thompson," derived by a chain of title to the location of Freudenthal, in January, 1882. It assigned for error that plaintiff failed to show that that location was valid under the mining laws, by proof that Freudenthal is a citizen of the United States; that the notice of location was posted on the claim; that he erected monuments marking the same on the ground.

The location notice was offered in evidence, and the same recites all the facts essential to a valid location; is signed by Samuel J. Freudenthal; and it was recorded on the second day of January, 1882, the day after the date of the location. The locator, and those claiming under him, have done annually one hundred dollars worth of labor on the mine ever since. A year after this location the witness Ferrie swears that he found monuments on the ground corresponding to those in the notice, and as agent for plaintiff he has done the work on the same since. There is proof that Freudenthal has been for many years a resident of the United States. In the absence of proof to the contrary, we think this evidence made out a title. To require titles to mining claims to be sustained by proof positive of all the requirements of the law would unsettle all confidence in these titles. Purchasers should rest secure in the titles they find of record; at least, until attacked. It will be presumed that a man being a resident of the United States, and who has made a mining location, was a citizen of

the United States; that he posted the notice of his claim, and properly marked the ground, in case where it appears that he recorded, at or near the time, a location notice reciting these facts. Such evidence will make out a *prima facie* title. It was held in *Strepy v. Stark*, (Colo.) 5 Pac. Rep. 111, that the location notice, when recorded, is *prima facie* evidence of all that the statute requires it to contain, and which are therein sufficiently set forth. The rule in ejectment, that the plaintiff must recover on the strength of his own title, and not on the weakness of defendant's, does not apply to possessory actions for mining claims. "Practically, the real question involved in such cases is, which, as against the other, has the better right to mine the land in question?" *Richardson v. McNulty*, 24 Cal. 339. Each must prove his claim to the premises in dispute, and the better right must prevail. *Strepy v. Stark*, (Colo.) 5 Pac. Rep. 111; *Lebanon Co. v. Mining Co.*, 6 Colo. 371; *Golden Fleece Co. v. Cable Co.*, 12 Nev. 312.

To overturn the *prima facie* case of plaintiff, defendant offered the testimony of a witness named Grant. He swore that he witnessed the location notice of Freudenthal, as appears by his attestation to the same; that he was a prospector, and was employed by Freudenthal; that he reported to him the discovery of ore; that he monumented the ground; that he caused him to prepare the notice. He testified that he did not put the notice on the mine. He also testified that the monuments erected by him differed from the boundaries. The testimony of this witness deserves no credit. He comes to dispute his own record made at the time; to dispute that which he had reported to his employer he had done; to discredit the title based upon acts done by him long before. To give weight to such evidence would put titles, which may be in the millions, at the mercy of the parol testimony of a witness, the value of the faith in whose acts developments have disclosed. It should be disregarded as unworthy of belief.

The judgment of the court below is affirmed.

[Civil No. 235. Filed January 19, 1889.]

[20 Pac. 183.]

WASHINGTON M. JACOBS, Plaintiff and Appellee, v.  
J. M. GEORGE, Defendant and Appellant.

1. PRINCIPAL AND AGENT—UNDISCLOSED DUAL AGENCY—CONTRACT—SPECIFIC PERFORMANCE.—An agent cannot enforce specific performance of a contract for his own benefit respecting the subject-matter of his agency where he has secretly acted for both parties.

BARNES, J., dissenting.

Former opinion, see same case, 2 Ariz. 93.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Reversed.

The facts are stated in the opinion.

Thomas D. Satterwhite, and H. W. Maxwell, for Appellants.

The alleged contract, which forms the basis of this action, even if it was ever executed and delivered to the plaintiff, was fraudulent and void, for the reason that, at the time of the alleged execution thereof, the plaintiff was the retained agent of Manuel Sanchez for the sale of said mine, and was under obligation to him to sell the same for the largest sum he could possibly obtain therefor. Hence any contract which the plaintiff might have entered into with the purchasers of said mine, of the nature or character of said exhibit C, by which he was to receive a commission from the defendants for procuring the sale of said mine to them, would necessarily be fraudulent and void.

Such contracts are universally held to be contrary to public policy, and courts of equity everywhere refuse to enforce them.

The decision of this court, on the former appeal of this case, is conclusive. *Dutton v. Milner*, 52 N. Y. 312; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; 2 Pomeroy's Equity Jurisprudence, 959; 1 Wait's Actions and Defenses, pp. 246-248, and authorities cited.

Even if the plaintiff was a part owner of said mine with

Sanchez this would not give him any better equitable standing before the court, for the reason that he would then be acting as trustee for said Sanchez in the sale of his three fourths of said mine. Therefore, if he held this fiduciary relation to said Sanchez he would be under the same equitable obligations, and would be required to exercise the same good faith towards him, and would be just as much forbidden to become the agent of the defendants for the purchase of said mine, as if the said Sanchez owned the whole of the said mine. 2 Pomeroy's Equity Jurisprudence, sec. 958, and authorities cited; 1 Wait's Actions and Defenses, pp. 246, 247, and authorities cited.

Even if it was a valid, executed contract, the court erred in decreeing to the plaintiff one sixteenth, or any other part, of said mine, under said contract, for the reason that, if the plaintiff acquired any interest therein, he acquired it by reason of his *trading and speculating with his principal's* property. In such a transaction the rule is well settled, that, when an agent thus deals with his principal's property and makes a profit out of the transaction, such profit, and the whole of it, belongs to his principal. 1 Pomeroy's Equity Jurisprudence, sec. 422; 2 Pomeroy's Equity Jurisprudence, secs. 587, 1049, and authorities; *Ferris v. Van Vechten*, 73 N. Y. 113; *Stow v. Kimball*, 28 Ill. 93; *Reichoff v. Brecht*, 51 Iowa 633; *Ringo v. Kinns*, 10 Pet. 269; Story's Equity Jurisprudence, sec. 1261.

Haynes & Mitchell, for Appellee.

WRIGHT, C. J.—This is the second time this case has been passed upon by this court, having been first decided at the January term, 1886, hereof. 2 Ariz. 93, 11 Pac. Rep. 110. It was stipulated by the attorneys in the case at the last trial that the evidence at the former trial should be considered as given at the new trial, subject to legal objections, etc. The case was tried by the court without the intervention of a jury. The court found for the plaintiff and appellee, whereupon the defendants and appellants duly filed their motion for a new trial; and, it being overruled, they have brought their case here by appeal.

The grounds specified in the motion for a new trial were

that the decision of the court was not justified by the evidence, and that the decision was against the law. The suit was one to enforce the specific performance of a contract, alleged to have been entered into on the tenth day of May, 1883, by and between Jacobs, the appellee, and the appellants, George, Hiertz, and Morgan, by the terms of which, in case they bought the mine, they were to deed back one fourth of it to the said Jacobs as commission for the sale and purchase thereof. The substantial facts, as deduced from the evidence,—at least all the facts we deem necessary for the proper determination of the questions raised by the motion for a new trial,—are as follows: That one Manuel Sanchez, who was a mining prospector both in Arizona and Mexico, was in the habit, during the years 1881 and 1882, and perhaps earlier than that, of taking samples of ore from mines which he had discovered to the appellee, W. M. Jacobs, to make assays of them,—Mr. Jacobs being an assayer in Tucson, Arizona Territory. In this way quite an intimacy seems to have grown up between them. Sanchez was a Mexican, quite ignorant, unable to write his own name, and with practically but little knowledge of the English language. There seems no doubt that Sanchez reposed great confidence in Jacobs. Hiertz, one of the appellants, testifies that, at the time negotiations were pending for the property, Jacobs said: "If you want that property, you keep quiet, and I will procure the owner of the property. You must not interfere with us, as this man [meaning Sanchez] has confidence in me, and I can deal better with him than you can." So that on the twenty-sixth day of January, 1883, Sanchez executed to Jacobs the following written appointment of agency, or power of attorney, to sell the mines of Sanchez:—

"This document is to show that I, Manuel Sanchez, for myself and my partners, give ample power to Don Washington M. Jacobs, whom I recognize as one of my partners, to sell, contract, or bond to whomever may interest themselves for the mines at the prices, to-wit, [here follow names and prices,] the quarter part of which mines belongs to W. M. Jacobs, as the owner of the fourth part of which he represents, so as to enable Mr. Jacobs to contract and guaranty with legality, give this, my signature, obliging me to respect in this

country or Sonora, religiously; and in proof whereof signed this in Tucson, the twenty-sixth day of January, 1883, before whom signed.

his  
"MANUEL X SANCHEZ.  
mark.

"Witnesses: MARK TULLY, and  
"FRANK R. BETTIS."

The mine in question is called the "San Ricardo," and is situated in the Ures District, State of Sonora, Mexico. Some months after the execution of the above power of attorney, Mr. Jacobs returned from a trip to this mine, with some of the ore therefrom, which sampled very rich. Morgan, one of the appellants, was at that time a mining agent in Tucson, and Jacobs exhibited to him the assays of this ore, and gave him the use of his (Jacobs') assay office, for Hiertz, another one of the appellants, to make assays of the ore also; he (Jacobs) agreeing to pay the expense of Hiertz's assay if it did not corroborate his. This assay of Hiertz was satisfactory; and on the eighth day of May, 1883, Morgan, who seems to have been the moneyed man of the individual appellants, entered into the following agreement with Jacobs, viz.:—

"I will go and examine the mine in Sonora at our expense, and, if the mines suit us, will take a bond for six months on the property at \$5,000, we to have all the ore we wish to take out of the mine, and have the privilege to do such work on the mines as we think proper, and either work the same by arastras or otherwise during the time pending our bond; or if, after examination of mines, we conclude to purchase, we will pay the owners \$1,000 cash after examination, if found satisfactory, and \$1,000 in sixty days, and \$1,000 in ninety days; balance, \$2,000, at expiration of bond. A failure or non-compliance to above will forfeit right to claim, and what is paid.

"Tucson, May the 8th, 1883.

J. S. MORGAN.

"I agree to use my best endeavors to secure the property above described, upon the terms specified.

"W. M. JACOBS."

A short time before this contract was executed Mr. Jacobs says Sanchez had told him he would take five thousand dollars for the mine, and no less. Two days after this contract be-

tween Morgan and Jacobs was entered into, Jacobs having sent for Sanchez, a contract for the sale of said mine for the sum of five thousand dollars was entered into by and between the appellee, Jacobs, and Manuel Sanchez, parties of the first part, and the appellants, George, Hiertz, and Morgan, parties of the second part, the terms of sale being identical with those contained in the contract between Jacobs and Morgan. At the same time, but in the absence of Sanchez, and without his knowledge or consent, Jacobs, the appellee and the appellants, George, Hiertz, and Morgan, entered into the following contract, viz.:—

“It is hereby agreed by and between J. M. George, J. J. Hiertz, and J. S. Morgan, parties of the first part, and W. M. Jacobs, party of the second part, as follows, to wit: The parties of the first part agree to proceed to Sonora, and there examine the Saint Ricardo Mine, and, if found on examination to be satisfactory, to pay for said property as provided for and specified in certain contract of May 10, 1883, made by the above-named parties and one Manuel Sanchez; and, in case said property shall be purchased by the said J. M. George, J. J. Hiertz, and J. S. Morgan, they each of them mutually agree to deed to the said W. M. Jacobs, as commissions for the sale and purchase of said mine, free of any and all expense to him, one quarter of said mine, for him to have, hold, or transfer at option, without expenses of taxes or assessment work, or other expense whatever. The party of the second part agrees, that for and in consideration of said one quarter of said mine, to give to the party of the first part the refusal and first option to purchase said one quarter of said mine whenever the said party of the second part shall conclude to bargain for, or sell, his said quarter of said mine. It is also further agreed by each of the parties herein named that either the party of the first part or the party of the second part shall have the right to erect and establish such reduction works upon or near said mine as they see fit, at their own expense, and develop said mine in such manner as in their judgment may seem to them best for their individual interests, without interference or hindrance by the other party of the second part. It is further agreed that the party of the first part are to have and receive all the profits arising from the



development of said mine, and the reduction of ores they may take from said property, until the party of the second part shall have disposed of said one quarter of said mine.

"Tucson, May 10th, 1883.

J. M. GEORGE.

"J. J. HIERTZ.

"J. S. MORGAN.

"W. M. JACOBS."

Jacobs had demanded this one quarter of said mine at the time he first told the vendees he could probably get the mine for them for five thousand dollars; it being in evidence that he told them also that it was worth ten thousand dollars. He told them they should give it to him as commission, but not to let Sanchez know anything about it. Sanchez did not know anything about it until quite a while after the trade was made. Then he told the parties that Jacobs had acted false with him, and had kept an interest for himself; and he demanded that appellants should pay him, and not Jacobs, for this one fourth interest. After some time appellants paid Sanchez twelve hundred and fifty dollars for the one-quarter interest in the mine, and took his deed therefor. Sanchez paid Jacobs one fourth of the original purchase money, the five thousand dollars, as the installments were paid. At the time the last payment or installment of the five thousand dollars was made, Jacobs executed to Sanchez the following receipt:—

"TUCSON, November 24, 1883.

"I received from Manuel Sanchez the sum of one thousand two hundred and fifty dollars, as part of the commission of the five thousand dollars which he received from J. M. George, J. J. Hiertz, and J. S. Morgan, for the sale on the contract of the mine San Ricardo, situated in the district of Ures, in Sonora, Mexico.

[Signed] WASHINGTON M. JACOBS.

"Witness: SANTIAGO AINSA."

The court decreed a specific performance of the contract sued on, to the extent of requiring the appellants to deed to Jacobs, the appellee, one fourth of one fourth, or one sixteenth, of said mine, and the question for us to determine is, was that finding under the law and the evidence correct? After a careful and deliberate consideration of this case we

have been unable to arrive at the same conclusion arrived at by the learned judge who tried it below. Is it not true that Jacobs was Sanchez's agent in the sale of the mining property in question to the appellants, George, Hiertz, and Morgan? The testimony of each of these appellants, the testimony of Ainsa, the power of attorney from Sanchez to Jacobs, the contract between Jacobs and Morgan, the contract of sale between Sanchez and Jacobs as parties of the first part, and George, Hiertz, and Morgan, the parties of the second part, and even the testimony and conduct of Mr. Jacobs himself, all shows that he was. Indeed, their relations were fiduciary; and Sanchez was entitled to the utmost good faith, and the fullest disclosure from Jacobs. True, Mr. Jacobs in his testimony, makes the following statement, upon which we must put the most charitable construction: "I had no hand whatever in the negotiation of this sale. I simply brought the parties together, and they made their own trade." If this were true, what right had he to call on the appellants to deed him a quarter interest in the mine? What consideration did they get for agreeing to do so? He either had or had not something to do with the sale. If he had nothing to do with it, then the contract by which he was to have one fourth of the mine deeded back to him was void for want of consideration. If he had nothing for them,—if he "had no hand whatever in the negotiation,"—what obligations were they under to him? But Mr. Jacobs contradicts himself, and shows that he did have something to do with the negotiation of the sale. In his redirect examination he says: "Hiertz made the assays, and they were so satisfactory that the parties came to my office the next day, and made arrangements with me about the purchase of the mine. I told them that they should give five thousand dollars for the mine, and that they should give me one-fourth interest for commission. After they had agreed to do this, they wanted me to use my influence with Sanchez to take the money in installments. I said, 'I suppose if you will pay about one thousand dollars in cash, and the rest in installments, he will be agreeable.'" Was not this substantially the trade that was eventually agreed upon? If so, who negotiated it? The truth is, Jacobs had a great deal to do with negotiating this sale; in fact, almost everything, especially

on the part of the vendors. Sanchez had generously made him a partner to the extent of one-fourth interest; had given him full written authority to sell the mine; and trusted him with that simplicity of confidence which the ignorant and inferior give to their superiors and those upon whom they rely; for he adopted the final contract of sale literally as Jacobs had originally negotiated it. Jacobs occupied a peculiarly sacred relation to Sanchez; he was his partner and confidential adviser; and equity will not permit Jacobs to avail himself of any advantage or contract which his position may have enabled him to obtain, to speculate or reap advantage off his principal. Sanchez was an unlettered Mexican. He could speak but little English, and could not write his own name. He had given to Jacobs his full confidence and "ample power to contract, sell, or bond" the mine. There was due, therefore, from Jacobs to him, the utmost good faith and rectitude of conduct; the fullest measure of skill, energy, and ability. The paramount duty devolved upon the agent to subserve the interests of his principal.

Beyond peradventure the evidence shows that in the highest sense of the term Jacobs was Sanchez's agent in this sale. If so, could he also represent the appellants, George, Hiertz, and Morgan, without revealing fully to Sanchez, on the one hand, and to appellants on the other, his full relations to each? Did he reveal to Sanchez that he was to have one fourth of the mine deeded back to him by George, Hiertz, and Morgan as commission? Did he tell the latter, before he negotiated the sale with them, that he was a quarter owner of the mine with Sanchez, and that Sanchez had given this quarter to him? If, however, he had revealed his true relations to the one, and not to the other also, would that have helped the matter any? The fact is incontrovertible that Jacobs not only did not reveal to Sanchez the important fact that by the terms of his contract with said appellants they were to deed back to him one fourth of the mine, but he repeatedly enjoined upon them not to inform Sanchez. If he was acting in good faith, why this injunction of secrecy? Will he be heard to say he had nothing to do with the negotiation of this sale, when the evidence shows that he did about all that was done on the part of the vendors? Actions speak louder

than words; and one cannot, at the same time, "blow hot and cold." Did not the appellee attempt to speculate in the subject-matter of his agency? Did he not get twenty-five per cent commission from Sanchez? And, by the terms of his secret contract with the purchasers, was he not to get twenty-five per cent commission from them also? Was the sphere of his conduct limited by either equity or good conscience? Was it right that he should have a semi-surreptitious commission of fifty per cent? And that, too, without having paid a dollar for the property, or been at a dollar's expense, and without having had any "hand whatever in negotiating the sale"? Was this not a fraud? And was not the fraud focalized when Jacobs made this speculative contract without the knowledge or consent of Sanchez, and failed to reveal it to him? "If a man, upon a treaty for a contract, will make a false representation, by means of which he puts the party bargaining under a mistake upon the terms of the bargain, it is a fraud." Did not Jacobs represent to Sanchez that they were to get five thousand dollars for the San Ricardo Mine? Was not Sanchez thereby deceived? Was that the price for the whole mine, or only three fourths of it? Did not Jacobs conceal from Sanchez the fact that in reality only three fourths of the mine had been sold for five thousand dollars, though Sanchez's deed was for the whole of it? In effect, Jacobs, by the terms of the sale, became a purchaser of one-fourth interest in the mine. In this position, according to well-established adjudication, he could not do this, especially when he mantled his conduct, and concealed the fact. In such cases the *suppressio veri* is as bad as the *suggestio falsi*; and it was as much a fraud upon Sanchez to conceal from him material facts concerning the sale as to have falsely represented the facts of the sale. This was positive, unmitigated fraud. Sanchez was certainly deceived; for he made a deed to the whole mine, and paid his agent, Jacobs, in good faith, twenty-five per cent of the whole five thousand dollars as commission. Jacobs says it was commission, in his receipt. True, he attempted by his individual parol testimony to contradict the receipt, and prove that it was something else; however, although this would infract a familiar rule of evidence, it was quite immaterial. The fact is he got twenty-five

per cent of the purchase money. It was wholly immaterial, also, whether there was any actual injury resulting to Sanchez, or not; it was the misrepresentation and suppression of material facts from him by Jacobs which would have entitled him to equitable relief, and which, so far as Jacobs is concerned, vitiates and nullifies the contract, by which, unknown to Sanchez, the vendees were to deed back to Jacobs one fourth of the mine. An agent cannot profit off of the subject-matter of his agency. If he sells property intrusted to him for sale for more than the minimum price for which he is authorized to sell, his principal is entitled to the excess. And if the arrangement by which he obtains the excess is concealed from the principal, it is a positive and flagrant fraud upon the latter's rights; and courts of equity will not enforce the arrangement if it be unexecuted, though the principle is the same in its application, whether the contract is executed or unexecuted. And where the agent undertakes to act for both parties it is no matter whether either or both are affected injuriously; for each is entitled to all his skill, ability, sagacity, and discretion. And if the agent assumes this dual agency without fully disclosing to all parties concerned his double relations, and enters into a contract with either party by which he seeks to enhance his own interests, courts of equity will deny relief on such contract. Courts of equity will go further in granting relief in such cases than courts of law; but we apprehend such an equitable defense would be good even in an action at law. Certain it is that the forum of conscience will not tolerate this sort of duplicity. Here the demand is absolute for good faith and clean hands; anything less, equity regards as fraud.

Lord Hardwicke, in his letters to Lord Kames, said: "As to relief against frauds, no invariable rules can be established. Fraud is infinite; and were a court of equity once to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive." And Labeo, one of the best of the early writers, defined fraud to be "any cunning, deception, or artifice used to circumvent, cheat, or deceive another."

This has ever since been the accepted definition of actual fraud. Courts of equity, however, will not only take cognizance of and grant relief in this class of frauds, but will interpose in the matter of all frauds which may come from a "breach of legal or equitable duty, trust, or confidence, justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another." Now, one of the strongest rules invoking the interposition of a court of equity is where one who sustains the relation of agent to principal, or some relation of trust or fiduciary character, takes advantage of the ignorance, weakness, or necessity of another. Here a court of equity will always act *ex æquo et bono*.

The court below may have proceeded upon the idea that as, by the secret understanding between them, the vendees only got three fourths of the mine, therefore Jacobs was entitled to one fourth of the remaining fourth. As between Jacobs and Sanchez, this might be true; and he may be entitled to one fourth of the twelve hundred and fifty dollars paid by the vendees to Sanchez for that one fourth,—that far he may have a valid claim against Sanchez. But as between Jacobs and appellants it is greatly different. He is entitled to no relief by virtue of the contract between him and them. That contract was fraudulent, and is therefore invalid. Public policy, the interests of society, the rectitude and integrity of human conduct, good faith on the part of those who act for others,—especially with temptations and inducements to dereliction when intrusted with interests other than their own,—require that these contracts be not upheld. And the rule is thoroughly well established by a long line of decisions, and a great weight of authority, that they will not be. We call attention to the following: *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Dutton v. Willner*, 52 N. Y. 312; *Cottom v. Holliday*, 59 Ill. 176; *Kerfoot v. Hyman*, 52 Ill. 512; *People v. Township Board of Overysse*, 11 Mich. 222; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Moore v. Mandlebaum*, 8 Mich. 433; *Railway Co. v. Dewey*, 14 Mich. 477; *Gaines v. Allen*, 58 Mo. 537; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Jacobs v. George*, 2 Ariz. 93, 11 Pac. 110; Story on Agency, sec. 214; 1 Story's Equity Juris-

prudence, secs. 191, 204; 2 Pomeroy's Equity Jurisprudence, secs. 941, 948, 959; 1 Wait on Actions and Defenses, 246.

There are other questions in the case, but it is not essential that they be determined here. The judgment of the court below is reversed, and it is hereby ordered, adjudged, and decreed that the complaint be dismissed with costs.

PORTER, J.—I see no reason to change my views in this case as expressed in my opinion reported in 2 Ariz. 93, 11 Pac. 110, and therefore concur in the judgment of reversal and dismissal.

BARNES, J.—I do not concur. The defendants were not defrauded. They are simply asked in this case to pay what they agreed to pay for the mine. Sanchez only was defrauded, if anybody, and no relief is sought against him. He is not a party.

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[Civil No. 233. Filed January 19, 1889.]

[20 Pac. 189.]

DOLORES ASTIAZARAN et al., Plaintiffs and Appellants,  
v. SANTA RITA LAND AND MINING COMPANY,  
Defendant and Appellee.

1. PUBLIC LANDS—MEXICAN GRANTS—JURISDICTION—COURTS—SURVEYOR-GENERAL—ACT OF JULY 22, 1854—ACT OF JULY 15, 1870, 16 U. S. STATS. AT LARGE, 291, CITED AND CONSTRUED.—Congress has conferred no jurisdiction on the courts of the territory to determine the validity of Spanish or Mexican grant. The statutes, *supra*, invest the surveyor-general with power to settle, primarily, these questions.
2. ACTION TO QUIET TITLE—PLEADING—MUST SHOW EQUITY—DISTINCTION BETWEEN LAW AND EQUITY PRESERVED—ELY v. RAILROAD CO., 2 ARIZ. 420, 19 PAC. 6, APPROVED.—A complaint in an action to quiet title must aver facts to bring the complainant under some head of equitable relief. The distinction between law and equity in this class of cases is still preserved.

AFFIRMED.—148 U. S. 80, 37 L. Ed. 376, 13 Sup. Ct. Rep. 457.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Jeffords & Franklin, and Rochester Ford, for Appellants.

The question of the jurisdiction of the court to entertain this action depends upon the construction of the following U. S. statutes: Act of July 15, 1870, (16 U. S. Stats. at Large, p. 291,) and the statute of 1854, therein referred to. The duty of the surveyor-general of Arizona is clearly set forth. He is "to ascertain and report upon the origin, nature, character, and extent, of the claims to land in said territory, under the laws, usages, and customs of Mexico and Spain. And for this purpose he shall have certain powers. He has those powers for no other purpose. The surveyor-general is not a tribunal nor a court; his power is merely to "ascertain and report." A tribunal or court has the power to hear and determine. The surveyor-general has no power to hear and determine. He is merely an investigating officer, who is to collect information for the benefit of Congress.

The deed of 1869 is to be construed according to the laws of Arizona in force at the time the same was made, because the lands it purports to convey are situate in Arizona. The title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. *McCormick v. Sullivan*, 10 Wheat. 202; *Kerr v. Moon*, 9 Wheat. 571; *Clark v. Graham*, 9 Wheat. 579.

Where land is the subject of a contract, the law of the place where it is situated governs the descent, alienation, and transfer, and the effect and construction of conveyances. *Brine v. Insurance Co.*, 96 U. S. 636.

Haynes & Mitchell, for Appellee.

WRIGHT, C. J.—Appellants brought this action in equity for the purpose of quieting title. In their complaint appellants claim title to about 52,000 acres of land derived from a



grant made by the Mexican Government on the 19th of April, 1844, to one Francisco Alexander Aguilar. At the trial below the court dismissed the complaint, and rendered judgment for costs against appellants. Motion for new trial was duly entered, and, upon the overruling thereof, the case has been brought here by appeal.

We are of opinion that the judgment of the court below should be affirmed, for two reasons: 1. Because the court had no jurisdiction; and, 2. If it did, the complaint did not state facts sufficient to constitute a cause of action in equity, and justify no relief in equity.

In this case it is difficult for us to reconcile a reasonable construction of the act of Congress of July 15, 1870, or the act of July 22, 1854, of which it was supplemental, with the contention of appellants' learned counsel for the court's jurisdiction. Beyond question the various acts of Congress creating particular tribunals, with power, in the first instance, to carry into effect the provisions of the treaty of Guadalupe Hidalgo, and the Gadsden purchase relating thereto, conferred upon those particular tribunals, within their respective territorial jurisdictions, exclusive power to determine, primarily, all questions touching land grants under the laws of Spain and Mexico.

This whole subject originally belongs to the political branch of the government. Over it Congress has absolute dominion; and no court or tribunal has any jurisdiction over matters pertaining thereto, except such as Congress has by act designated, and then only to the extent to which it has conferred jurisdiction. As instances, Congress, by its act of 1851, conferred upon the commissioners power and jurisdiction to settle, primarily, all questions pertaining to land grants under Spanish or Mexican laws in California; and by the act of 1854, it conferred like power and jurisdiction upon the surveyor-general of New Mexico; and by the supplemental act of July 15, 1870, similar power and jurisdiction were extended to and conferred upon the surveyor-general of Arizona. Under the constitution, Congress alone can dispose absolutely of the public domain; therefore, for the *modus operandi* of its disposition, we must look to federal legislation. If there has been an expression of the legislative intent,

it is the duty of the court, as a subordinate branch of the judicial department of the government, to carry out the legislative will. Now Congress has given power to no tribunal, has conferred jurisdiction upon no forum, primarily, to pass upon and determine questions affecting the validity or invalidity of Spanish or Mexican land grants in this territory, except the surveyor-general. By the acts above referred to, he is given power, and it is made his duty, to determine, in the first instance, the validity, origin, nature, character, and extent of all these grants. This is a vast primary power; but however much we may question the wisdom and practical utility of the laws conferring upon this officer such power and jurisdiction, still the stubborn fact remains that courts have nothing to do with legislation. Perhaps the speediest and surest way to secure the enactment of a good law is the vigorous enforcement of an objectionable one. These views are so simple and familiar that it almost seems a tautological task to express them. They are but the expression of the common mind. It is unnecessary to say we make no intimation that the finding and decision of the surveyor-general are final or conclusive. They are not. But their effect is to hold in abeyance the title to the lands covered by the grant, and to withdraw them from sale or other disposition by the government, until the final action of Congress.

There might be questions not involving title, such as forcible entry and unlawful detainer,—mere questions of the right of possession,—which the courts might exercise jurisdiction to determine. And while it may be that in *Chaves v. Whitney*, 4 (Gild.) N. Mex. 611, 16 Pac. 608, the supreme court of New Mexico went a little too far, still there might be cases in which the territorial courts might exercise a limited jurisdiction in order to preserve the *status in quo*.

No such question, however, is presented by the record here. It is to be observed that this case seemingly overrules *Whitney v. McAfee*, 3 (Gild.) N. Mex. 550, 1 Pac. 173. The syllabus seems also to be sustained by the decision; but we hardly believe the court meant that the action of the surveyor-general has no legal effect whatever. Is it not true that the courts are bound by the reports of these officers until the final action thereon by Congress? Until then can the courts adjudicate

upon the titles to the lands affected by those reports? *Tameling v. United States Freehold etc. Co.*, 93 U. S. 661, does not, we think, fully support the position that the decision and report of the surveyor-general are not binding upon the courts of New Mexico until confirmed by Congress. Can it be that, until Congress confirms these reports, they have no legal effect whatever? What tribunal is clothed with absolute authority to determine, in the first instance, not only the validity, but the origin, nature, character, and extent of land claims of Spanish or Mexican origin in New Mexico, if not the office of the surveyor-general? Certainly, if he has this power, his acts are of some legal effect, and the courts there as well as elsewhere are bound by them.

But the appellants, by their learned counsel, insist that as the grant of the lands in question by the Mexican Government to the elder Aguilar in 1844 was a perfect grant; and as there have been since the Gadsden purchase sundry mesne conveyances of the lands included in the grant by the said Aguilar or those claiming under him, the court had jurisdiction to pass upon these various conveyances, and to adjudicate upon the rights of the parties thereunder, notwithstanding the surveyor-general of this territory had ascertained the origin, nature, character, and extent of said grant, and had rendered his decision thereon, had reported to Congress, and there had been no final action by Congress upon that report. We do not think this position tenable. Suppose the court had assumed jurisdiction, and had adjudicated upon the rights of the parties, had passed upon and judicially construed these various conveyances, and decided that one party or the other owned the lands in fee; then suppose Congress had passed an act not confirming the report of the surveyor-general, but declaring the said grant to the elder Aguilar invalid: what would the decision of the court have been worth? Again, suppose the court had decreed title to these lands in one party, and the action of Congress confirms the title to the other party, can it be for a moment doubted that the action of the court would be worse than a nullity? Would not the other party own the lands in the face of the court's decree?

It seems to us indisputable that, until Congress acts upon

the decision and report of the surveyor-general, the courts cannot pass upon any questions involving the title to lands of Spanish or Mexican origin, prior to the Gadsden purchase; and to pass upon questions as to the nature, character, legality, etc., of these conveyances, would necessarily be to pass upon questions involving the validity or invalidity of a Mexican land grant. By the sixth article of the Gadsden purchase, the United States expressly refused to be obligated or bound by any Spanish or Mexican grant "that had not been located and duly recorded in the Mexican archives." So that it is titles under valid grants only that Congress will confirm, and, unless attacked directly for fraud or mistake, the courts will not review the action of land-officers. When the questions cease to be matters of Congressional cognizance, and are relegated to the domain of private rights, then the jurisdiction of the courts would attach; not to the extent, however, of exercising power or jurisdiction to review or modify Congressional action on the decision and report of the surveyor-general. We do not believe the action of this officer is subject to collateral attack, it being a principle of law, well recognized, that where a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its action, when confined to the scope of its authority, is conclusive, unless changed or modified by paramount authority.

But it is claimed by appellants that the surveyor-general exceeded his authority in making his report. If so, should not this claim be established before the Congress of the United States, and thus prevent Congressional action confirming that report? If he exceeds his authority, would that justify the court's interference? But we cannot see that the surveyor-general in this case exceeded his statutory authority. Should the court have passed upon these mesne conveyances, and thus determined who had properly derived title under the original grant from the elder Aguilar? Could the court determine whether any title descended or had been acquired from him, without first determining whether he, himself, had any title? Would it not thus be incumbent upon the court to determine the validity of the original grant? Can the stream rise above its source? or, rather, will not the source largely determine

the character of the waters? And will not the original source of title in a great measure characterize all deraignments under it? Hence we say the courts cannot act until Congress acts upon the surveyor-general's report. Until then, it is not subject to review in any forum. If this be so, the court below had no jurisdiction, and rightly dismissed the bill. See *Johnson v. Towsley*, 13 Wall. 72; *Tameling v. United States Freehold etc. Co.*, 93 U. S. 661; *Maxwell Land-Grant Case*, 121 U. S. 325, 7 Sup. Ct. Rep. 1015; *Whitney v. McAfee*, 3 (Gild.) N. Mex. 550, 1 Pac. 173.

We do not think the averments in the complaint were sufficient to constitute a cause of action, according to the well-established rules of equity pleading, or justified equitable relief. In the case of *Ely v. Railroad Co.*, 2 Ariz. 420, 19 Pac. 6, this court held that while the Arizona statute of 1881 contravened the old equity rule that a party must be in possession before he could maintain a peace bill or an action *quia timet*, still it was necessary for the plaintiff in his complaint to have brought himself under some head of equitable remedy; and that, where the complaint on its face revealed a clear and adequate remedy at law, the plaintiff must resort to legal, and not equitable, tribunals. The complaint in that case was quite similar to the one at bar. In neither was it averred that plaintiff was in possession, or was even entitled to possession, or that defendant's claim was a cloud upon their title, or any other fact invoking equity cognizance.

The supreme court of Texas has gone far towards abolishing the distinction between law and equity in this class of cases. The greater weight of authority, however, is still, we think, in favor of preserving the distinction, and the fundamental rule is still in vogue. That rule, as laid down in Mr. Pomeroy's *Equity Jurisprudence*, is that, "in order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential,—either the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable, or, if it be a remedy which may also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and ade-

quate through the equitable modes of procedure." Section 130.

For the reasons assigned in *Ely v. Railroad Co.*, we must hold that the complaint in this case does not state facts sufficient to constitute a cause of action in equity. See also *Gage v. Curtis*, 122 Ill. 520, 14 N. E. 30, and *Curry v. Peebles*, 83 Ala. 225, 3 South. 622.

Without deeming it necessary to consider other questions raised, the judgment of the district court is affirmed.

BARNES, J.—I concur with the decision, as I hold that a Mexican grant is not legal title to sustain action of ejectment or bill to quiet title. Such grant must be confirmed by Congress first.

PORTER, J.—Congress having provided a special tribunal for the adjudication of these claims, this court has no jurisdiction to determine titles to the lands. I concur in the judgment.

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[Civil No. 242. Filed February 13, 1889.]

[20 Pac. 311, *sub nom.* Bryan v. Kaies et al.]

T. J. BRYAN, Plaintiff and Appellant, v. D. H. PINNEY et al., Defendants and Appellees.

1. EQUITY—LACHES—ACTION TO SET ASIDE JUDGMENT OF FORECLOSURE.

—Where plaintiff's grantor stood by and saw property sold under foreclosure, failed to redeem, brought no action to set aside the judgment of foreclosure, for nearly four years saw the property enhance greatly in value, saw it sold time and time again, then sells it to the plaintiff, who asks that the judgment be annulled and the subsequent transfers canceled, equity will refuse relief, the parties having slept too long on their rights.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge. Affirmed.

The facts are stated in the opinion.

Cameron H. King, and Goodrich, Smith & Street, for Appellant.

The only point to be considered in this court is the question of laches. We submit that the statute of limitations applies with equal force under our statutes to actions at law and suits in equity. Mere delay or laches in bringing suit for land short of the period prescribed by the statute of limitations will not defeat plaintiff's action. Angell on Limitations, pp. 24, 25; Wood on Limitation, p. 115, sec. 58; *Elmendorf v. Taylor*, 10 Wheat. 168; *Rogers v. Brown*, 61 Mo. 187-191; *Lux v. Haggin*, 69 Cal. 267, 10 Pac. 674; *Lord v. Morris*, 18 Cal. 486, 489; *Gratton v. Wiggins*, 23 Cal. 34; *Hancock v. Plummer*, 66 Cal. 338, 5 Pac. 514; *Piller v. S. P. R. R.*, 52 Cal. 44; *Williams v. Conger*, 49 Tex. 602; *Hardy v. Hardin*, 4 Saw. 548, Fed. Cas. No. 6060; *White v. Sheldon*, 4 Nev. 288; *United States Bank v. Daniel*, 12 Pet. 56; *Gray v. Bartlett*, 20 Pick. (Mass.) 193, 32 Am. Dec. 208.

Baker & Campbell, Clark Churchill, and D. H. Pinney, for Appellees.

As to the statute of limitations, it is contended by appellant that the statute applies with equal force to actions at law and suits in equity. This is so in many cases. There are three classes of cases in regard to the bar of time: First, those in which equity is bound to apply the statute of limitations,—i. e. in all cases of concurrent jurisdiction at law and in equity. 2 Story's Equity Jurisprudence, 1520; *Hall v. Russell*, 3 Saw. 575, Fed. Cas. No. 5943. Second, those in which it merely acts in analogy to those statutes and not in obedience to them. (See the examples in Story, *supra*, and cases cited by appellant. *Elmendorf v. Taylor*, 10 Wheat. 168, is notably of this class.) Third, those in which the court is neither bound nor acts upon the principle of analogy to them, but proceeds on doctrines peculiar to and inherent in itself.

"But a defense peculiar to courts of equity is founded upon the mere lapse of time and the staleness of the claim in cases where no statute of limitations directly govern the case." 2 Story's Equity Jurisprudence, 1520. To the latter class is usually assigned (1) those cases in which the public convenience requires there shall be a speedy end of strife, (2)

others in which some of the principal parties in transactions sought to be reviewed are dead and their vouchers lost, (3) others in which the court could not be certain, from lapse of time, that relief apparently proper would certainly be just, and (4) others where the disturbance of purchasers or transactions acquiesced in for a greater or less time would prejudice the vested rights of third persons. *Etting v. Marx*, 4 Fed. 673.

It is evident that this case belongs to the class where a court of equity assumes the untrammelled prerogative of deciding, independent of any statute of limitations, whether the complainant has used such diligence in exhibiting his demand as the nature of the particular case required. *Etting v. Marx*, 4 Fed. 673; Wood on Limitation, secs. 58, 59. And this doctrine has been steadily adhered to in a great variety of cases. *Harwood v. Cincinnati R. R. Co.*, 17 Wall. 78-81; *Twin Lock Oil Co. v. Marbury*, 91 U. S. 587, 594; *Badger v. Badger*, 2 Wall. 87-96; *Marsh v. Whitmore*, 21 Wall. 178-185; *Sullivan v. Portland and Kennebeck R. R. Co.*, 94 U. S. 806-812; *Wagner v. Baird*, 7 How. 235; *Smith v. Thompson*, 7 Gratt. (Va.) 112, 54 Am. Dec. 126, and notes; *In re Lord*, 78 N. Y. 111; 2 Perry on Trusts, sec. 870; Story's Equity Pleadings, 813; *McQuiddy v. Ware*, 20 Wall. 14-20.

"Any irregularity in a sale which renders it voidable will be deemed to be waived if it is not taken advantage of within a reasonable time and before innocent parties acquire rights." 2 Jones on Mortgages, sec. 1674; *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Rigney v. Small*, 60 Ill. 416.

It is suggestive to note the increase of the value of this property during the inaction of the complainant (about four years), from \$6,801.25 (the price at a judicial sale) and \$125,000, at the time of filing this suit.

PORTER, J.—The bill in this case sets forth that plaintiff is a resident of Maricopa County; that some of defendants reside in same county, and others in places outside the territory; that one Jonathan M. Bryan, on or about the twentieth day of August, 1883, died intestate, and at his death was the owner, seised and possessed, of several tracts of land described in the bill, all situated in the county of Maricopa; that on or



about the twenty-fourth day of September, 1883, letters of administration upon the estate of Jonathan M. Bryan, deceased, were issued by the probate court of Maricopa County to M. W. Kales, defendant herein; that during the life-time of Bryan he executed to Kales certain promissory notes, for the security of the payment of which he also executed and delivered to Kales a mortgage on all the real estate described in the bill; that said Kales, without presentation for allowance of his debts in the probate court, commenced an action in the district court of the second judicial district for Maricopa County in his own proper person and name, and in his individual capacity, against himself in his representative capacity as administrator, and made answer to the complaint in such representative capacity. Whereupon, on the ninth day of October, 1883, a judgment of foreclosure was made and entered, and on the eighth day of November, 1883, the district court made an order of sale of said premises; that in pursuance thereof sales were made of the different parcels of the land, the defendant Robert Garside being the purchaser of one piece, M. W. Kales of two other separate pieces, and defendant William Gilson of another portion; that after the sales, and before the making of any deeds by the sheriff, Kales sold one quarter section to J. T. Simms, and the certificate of purchase was set over to Simms; that Kales, before the making of any deed, assigned to defendant D. H. Pinney block 98 of the city of Phoenix, it being a part purchased by Kales at sheriff's sale; that on June 16, 1884, the sheriff executed and delivered to Garside a deed of the part he bought, and that Garside, on May 27, 1887, sold the same to defendant J. De Barth Shorb; that on June 10, 1884, the sheriff executed and delivered a deed to Simms, as assignee of the certificate of purchase from Kales, the parcel of land so purchased by him; that defendant Simms, on February 28, 1887, sold the same to defendant George T. Brassius, who subdivided the same into blocks and lots, with streets running through said property, which is now known and designated as "Central Place"; that Brassius sold a lot therein to John W. Jeffries on May 3, 1887, and on May 5, 1887, sold another lot to defendant Henry W. Ryder; that on June 19, 1884, the sheriff executed a deed to defendant William Gilson for the part purchased

by him, who on April 6, 1886, sold the same to defendant Cordelia L. Beckett; that on the 16th day of June, 1884, the sheriff executed a deed to D. H. Pinney, who on the 10th day of September, 1886, sold a portion thereof to defendant the Bank of Napa, Cal., and that said Pinney, on November 18, 1886, conveyed another part of said block to defendant F. Q. Story, who thereafter sold the same to defendant M. H. Sherman, who is now in possession of the same. The bill further states that, at the time of the death of said Jonathan M. Bryan, Vina Bryan was the wife of Bryan, and did survive him without issue, and said Bryan left no descendants; that all of the property was community property, and that she thus acquired title to the property, and so held the same, until the twenty-ninth day of June, 1887, when she conveyed the same to plaintiff, Thomas J. Bryan, for a good and valuable consideration. The bill alleges that the price bid and paid for each respective piece of property was an inferior price, and less than each was worth in open market; that of all the facts so alleged the defendants, and each of them, had full notice; that the defendant D. H. Pinney was the judge of the district court, and acted as such in all the proceedings had in said action, and was the judge of said court at the time of the assignment of the certificates of sale to him. It is alleged that the premises are of the value of \$125,000. The prayer of the bill is that all the proceedings made by the district court in the action where M. W. Kales was plaintiff and M. W. Kales was administrator be annulled, and the sales and certificates of sale be declared void, and the different parcels of the property conveyed, or attempted to be conveyed, be decreed to have been received with notice and in trust for Vina Bryan and her grantee, this plaintiff; that it be decreed that each respective part be decreed to be held in trust for this plaintiff, and that each of the defendants claiming to own any portion of said land by each, respectively, do convey to the plaintiff; that they be enjoined from selling the same. The defendant demurred for several causes, among them that the bill is insufficient to require him to answer thereto. The district court sustained the demurrer, because of laches in not bringing this action sooner, allowing plaintiff to amend his bill so as to show that there were no laches,

which plaintiff declined to do, and appealed to this court. All of this property was sold at a judicial sale. The price paid in the aggregate, as shown by the bill, amounted in round numbers to \$5,000. It is now alleged to be worth \$125,000.

It appears that the grantor of plaintiff stood by and saw all this property sold, and had a right to redeem the same in six months after the sale; that her residence was in Maricopa County, at the death of her husband, and its continuance will be presumed to be there, the contrary not having been alleged; that there was no action brought to set aside the judgment; that from the eighth day of November, 1883, till the ninth day of June, 1887, nearly four years, she saw the property greatly enhancing in value, saw it sold time and time again, then sells it to the plaintiff, who now comes into a court of equity and asks a cancellation of all those sales.

If the bill had shown, and which plaintiff was allowed to show, that any disability existed on the part of any one having an interest in the property at the time of sale, we would grant the prayer of the bill. No such disability being shown, can we think of allowing the party who has so long slept upon her rights to divest the present owners of their valuable property?

It may be argued that these parties buying property which had been sold under a decree of court should have looked into the validity of the judgment; that they, seeing an action of M. W. Kales against M. W. Kales as administrator, should have gone further, and inquired if they were the same persons. Granting that,—and upon which we express no opinion,—equity requires that the action in equity should have been sooner commenced. It is true that in an action at law under the statute five years to commence an action is allowed.

In the case of *Harwood v. Railroad Co.*, 17 Wall. 78, “Harwood and others, representing that they were stockholders in the Cincinnati and Chicago Railroad, filed on the 25th of December, 1865, a bill in the district court against the Air-Line Railroad Company and others, to vacate a decree rendered in the same court in the early part of the year 1860, in a suit by George Carlisle as trustee of a second mortgage on the road for the benefit of a certain second issue of bonds against the said Cincinnati and Chicago Railroad Company.

The bill in the case at bar alleged fraud and collusion in that suit between Carlisle and his confederates and certain other persons, lessees of the road, and in its possession, and who had agreed to pay the interest on the mortgages. It alleged that by the concurrence of these several parties the road had been allowed to lose credit, and that the payment of interest on its second mortgage bonds was willfully neglected in order that the property might be sold; that this arrangement had been carried out, and that the road had been sold and purchased in by the conspirators for about \$25,000, when it was really worth \$2,000,000 above a first mortgage of the same sum to which it was subject, and that the stockholders in the original road were injured by this collusive and fraudulent sale."

Let us read a part of the opinion of the supreme court, and see if it does not exactly fit the case before us. The court says: "We are of the opinion, also, that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears, they have slept upon their knowledge for several years. Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen." See, also, *Diefendorf v. House*, 9 How. Pr. 243; *The Key City*, 14 Wall. 653.

If in any case "the principle that the delay which will defeat a recovery" will apply, it is the one at bar,—the presence of the grantor of plaintiff, seeing improvements on the property; seeing it first gradually improving from year to year, and then daily enhancing in value, and, when the "boom"

was reaching its acme, selling to the plaintiff, who seeks to acquire this property, which sold at public vendue for about \$5,000, and is now alleged to be worth \$125,000. To recover in such a case would be manifestly unjust, and should have no standing in a court of equity.

The judgment of the district court is affirmed.

Wright, C. J., and Barnes, J., concur.

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[Civil No. 238. Filed February 13, 1889.]

[21 Pac. 332.]

T. J. BRYAN, Plaintiff and Appellant, v. D. H. PINNEY,  
Defendant and Appellee.

1. PRACTICE—INVOLUNTARY NONSUIT—REV. STATS. ARIZ. 1887, PAR. 764 —COMP. LAWS 1877, SEC. 2586, CITED.—Under paragraph 764, Rev. Stats. Ariz. 1887, providing that: "At any time before the jury has retired, the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his own claim for affirmative relief," an involuntary nonsuit cannot be granted.
2. UNITED STATES SUPREME COURT DECISIONS BINDING.—The supreme court of this territory is bound by the decisions of the supreme court of the United States, which has appellate jurisdiction over the courts of this territory.

WRIGHT, C. J., dissenting.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge. Reversed.

Cameron H. King, Goodrich, Smith, Street & Goodrich, and E. J. Edwards, for Appellant.

Baker & Campbell, for Appellee.

PORTER, J.—The only question necessary to be determined in this case is whether in this territory an involuntary nonsuit can be granted. By the late Compiled Laws (sec.

2586) a nonsuit was granted (1) "by the plaintiff himself at any time before trial, on the payment of costs; . . . (5) by the court upon motion of the defendant, when upon trial the plaintiff fails to prove a sufficient case for the jury." The Revised Statutes (sec. 764) provides: "At any time before the jury have retired the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his own claim for affirmative relief." The legislature, having acted on the same question, leaves out clause 5 of nonsuit of Compiled Laws. Can anything be plainer than a denial of an involuntary nonsuit, except wherein affirmative relief was asked by defendant? The mode is pointed out, and we cannot get around it. Had there been no legislation on the subject, we would be bound by the decisions of the supreme court of the United States, which has appellate jurisdiction over the courts of the territory. In *Castle v. Bullard*, 23 How. 172, the court says: "Circuit courts have no power to grant a peremptory nonsuit against the will of the plaintiff. It was expressly so held by this court in *Elmore v. Grymes*, 1 Pet. 471, and the same rule was also affirmed in *D'Wolf v. Rabaud*, 1 Pet. 497. In the case last named the defendants at the trial, after the evidence for the plaintiff was closed, moved the court for a nonsuit, which was denied, and the defendant excepted, and sued out a writ of error; but this court held that the refusal to grant the motion constituted no ground for the reversal of the judgment; remarking, at the same time, that a nonsuit cannot be ordered in any case without the consent and acquiescence of the plaintiff." And in *Crane v. Lessees of Morris*, 6 Pet. 609, on same question of nonsuit, say "that this point was no longer open for controversy." See, also, *Silsby v. Foote*, 14 How. 222. It is well to say that on the trial in the court below, while objection was made that the nonsuit was improperly granted, the attention of the court was not directed to the existing statutes on the subject, nor were the decisions of the United States supreme court presented.

The judgment of the court allowing the nonsuit is reversed.

BARNES, J.—I concur with Judge Porter. While the granting of an involuntary nonsuit may not always be such

an error as should cause a reversal, yet in a case of doubt it should. Defendant has a right to such a judgment as shall bar him, unless plaintiff escape by a voluntary nonsuit. While there is a conflict of authority on this question, we prefer to follow the practice approved by the supreme court of the United States, which has appellate jurisdiction over the courts of territories, that involuntary nonsuits be not allowed. *Elmore v. Grymes*, 1 Pet. 469; *D'Wolf v. Rabaud*, 1 Pet. 476; *Crane v. Lessees of Morris*, 6 Pet. 598; *Castle v. Bullard*, 23 How. 172; *Boucicault v. Fox*, 5 Blatchf. 87, Fed. Cas. No. 1691; *Silsby v. Foote*, 14 How. 218. This rule also prevails in England, and in many of the states. 2 Tidd's Practice, 869; *Dewar v. Purday*, 4 Nev. & M. 633; *Newmarch v. Clay*, 14 East, 239; *Watkins v. Towers*, 2 Term R. 275; *Elworthy v. Bird*, 13 Price, 222; *Dickey v. Johnson*, 13 Ired. (35 N. C.) 450; *Scruggs v. Brackin*, 4 Yerg. 528; *Hunt v. Stewart*, 7 Ala. 525; *Martin v. Webb*, 5 Ark. 72, 39 Am. Dec. 363; *Hill v. Rucker*, 14 Ark. 706; *Insurance Co. v. Soulard*, 8 Mo. 665; *Wells v. Gaty*, 8 Mo. 681; *Case v. Hannahs*, 2 Kan. 490; *Williams v. Port*, 9 Ind. 551; *French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616; *Cahill v. Kalamazoo Co.*, 2 Doug. (Mich.) 124, 43 Am. Dec. 457; *Lyon v. Daniels*, 14 Pa. St. 197; *Railroad Co. v. Button Co.*, 24 Conn. 468; *Davis v. Davis*, 7 Har. & J. 36; *Amos v. Sinnott*, 4 Scam. 447; *Deshler v. Beers*, 32 Ill. 369, 83 Am. Dec. 274. And the weight of authority seems to sustain this view.

WRIGHT, C. J., dissenting.—I cannot concur in the views of my associates in this case. The court in its opinion only passes upon the question of involuntary nonsuit. In this dissenting opinion, however, I have deemed it appropriate to consider the other important questions in the case, viz., the propriety of the court's action below in allowing defendant to read the balance of the probate record of the administration of the estate of J. M. Bryan, deceased, without going into the evidence in chief. It is to be observed in the outset that in neither of the three bills of exceptions preserved was there a single exception saved as to the rulings of the court upon the papers, deeds, etc., offered by plaintiff for the sole purpose, as expressed at the time, of deraigning title to a common

source. This the plaintiff had the undoubted right to do, under chapter 1, section 3144, Revised Statutes, concerning the "Trial of the Rights of Property." Indeed, no objection seems to have been made by the defendants, and therefore no right of plaintiff under said paragraph was thus far infringed upon. Without objection or exception, plaintiff was allowed to prove a common source of title emanating from one Chenoweth and wife; the first link in plaintiff's chain of title being the deed from Mrs. Vina Brown (formerly Bryan), widow and heir of J. M. Bryan, deceased, and the last link being the deed from said Chenoweth and wife to said J. M. Bryan, deceased. Now, all there is of said section 3144 is that, after plaintiff has thus deraigned title to a common source, the papers, etc., by which the deraignment is made, are not evidence of title in the defendant, unless offered in evidence by him, in which event the plaintiff is not to be debarred the right to make any legal objections to the same. The defendants, however, offered no evidence of title, and therefore plaintiff's rights under the latter part of said paragraph were unaffected; so that the right of the plaintiff to offer the said papers for the purpose of the deraignment only was certainly not denied him. But plaintiff having in his amended complaint alleged the fact, and then proven it by the said Vina Brown, that said J. M. Bryan died intestate in August, 1883; that he had property, etc., and that she was his widow and sole surviving heir, it was a most natural and reasonable inquiry that seemed to suggest itself to the mind of the trial judge, what is the *status* of that estate? Has there been an administration? Were there any debts? If so, have they been paid? Has the administrator rendered his final account? Has there been a final decree of distribution? And has the administrator been finally discharged? We can well suppose that such queries most naturally suggested themselves, especially in view of paragraph 1463, section 1, chapter 26, Compiled Laws 1877, then in force. That paragraph reads: "When any person shall die seised of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee-simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts," etc. These considerations be-



came the more forcible, doubtless, when it was recalled that section 194, paragraph 1711, chapter 29, of said laws, required the administrator to take possession of all the real estate, as well as the personal, of the deceased. That paragraph further provides that, "for the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators shall be deemed the possession of the heirs or devisees. Such possession by the heirs or devisees shall be subject, however, to the possession of the executor or administrator, for all other purposes." One of the most important of "the other purposes" is to pay the debts of the deceased. Well, after deraigning title to a common source, this difficulty occurred; and, to obviate it, plaintiff offered in evidence a portion only of the probate court record of this administration, viz., the order granting letters of administration, and that the administration had been closed, and the administrator discharged. Here the defendants seem to have interposed their first real objection; they insisting that, in justice to them, plaintiff should be required to produce the whole probate record of said administration. To this view the court yielded assent, and so ruled, to which ruling of the court the plaintiff excepted; and this brings up for consideration the first real question in this case. It must be borne in mind that, upon the refusal of plaintiff to introduce the whole record, the court permitted defendant to read the balance of it, without going into their own evidence. Was this error? We are clearly of the opinion that it was not. The rule is an old and well-established one that, where the plaintiff introduces a portion of a record, the defendant, on demand and for purposes of explanation, is entitled to have read all the remaining portions thereof that are pertinent, at least, immediately and before the intervention of other evidence, and *vice versa*, in order that the court can consider and properly construe the whole record. The reason of the rule is apparent. The portions not read may, and often do, elucidate the portions read. Mr. Greenleaf, in his treatise on Evidence (vol. 1, 14th ed., sec. 511), quotes from Chief Baron Comyns, in which, concerning this rule, he says: "The whole record which concerns the matter in question ought to be produced." Phillips on Evidence (vol. 2) lays down the same rule. And in the

supreme court of the United States, in *Greenleaf's Lessee v. Birth*, 5 Pet. 132, Mr. Justice Story distinctly recognizes the rule, and says: "We must take these proceedings, if at all, [referring to certain proceedings in bankruptcy,] together. . . . It is not competent for a party to insist upon the effect of one part of the papers constituting his own evidence, without giving the other party the benefit of the other facts contained in the same papers." Nor have the state supreme courts varied from this rule. In *Hargis v. Morse*, 7 Kan. 415, Mr. Justice Brewer says: "A party may not introduce part of a record, and, relying on presumptions, withhold the remainder." And in *Ogden v. Walters*, 12 Kan. 284, the supreme court of that state reiterates the doctrine, and says: "As a general rule, where a party relies upon a record as proof, he must introduce the whole of it; and, if he does not do so, the presumptions from silence or absence will be against him, and not in his favor." And in *Towne v. Milner*, Chief Justice Horton, of that state, enunciates the same doctrine. See 31 Kan. 207, 1 Pac. 613. In *Thayer v. McGee*, 20 Mich. 195, Mr. Justice Christiancy said: "The plaintiff having himself introduced the enrollment of the decree and proceedings, which, by the statute, constituted collectively the record of the chancery cause, and the plaintiff having read a portion of the papers constituting that record, the whole was in evidence, and the defendants had the right to read any other portion. . . . The defendants had a right to use any such evidence for the purpose of explaining or construing the decree." And in *Platt v. Stewart*, 10 Mich. 260, the same distinguished jurist said: "The defendants claimed through the proceedings, and it was for them to put in evidence, if not absolutely every paper in the enrolled record, at least all which had any bearing upon the question whether the proceedings, as a whole, had divested the title of Whitehouse; for the question was not simply upon the independent effect of each separate paper constituting the record, but upon the joint effect of all taken together. The effect of one paper, or part of the record, might modify that of another. The defendants could not select such as might operate in their favor, and throw upon the plaintiff the proof of those parts which might operate against them. The latter, as well as the former,

must be treated as a necessary part of the defendant's evidence." *Mutatis mutandis*, one might suppose he was speaking of the case at the bar. See, also, *Lee v. Lee*, 21 Mo. 531, 64 Am. Dec. 247, and *Spanagel v. Dellinger*, 38 Cal. 278.

Hence we are unable to see that the court below committed any error in allowing the defendants, upon refusal of the plaintiff to do so, to read the balance of the probate record, without going into their own evidence. The action of the court involved a question which, we think, is a good example, and well illustrates the rule we have just been considering. The portions of the probate record read by the plaintiff showed that there had been an administration of the estate of J. M. Bryan, deceased, and that that administration had been closed; but, while that was true, the balance of the record showed that there were still about eleven thousand dollars of the debts allowed against the estate remaining unpaid. This being true, was not and is not the property conveyed by the widow and heir of J. M. Bryan, deceased, to the plaintiff herein, subject to the payment of these debts? Are not the rights of the creditors represented by these debts paramount to the rights of the heir or her vendee? Did not this property descend to the heir, subject to the payment of the debts of the intestate? In law, was not this a condition precedent to the inheritance? It will not do to say the heir or her grantee can maintain this action, forsooth, because at the time the suit was instituted, although there was a large amount of unpaid debts owing by the estate, there was no acting administrator; for any one of the creditors could have letters of administration taken out anew, and thereby defeat the action, their rights being paramount to those of the heir or her grantee; and therefore such administration would take precedence, entitling the administrator to the possession of the realty belonging to the estate. The true theory on this subject, we think, is, as was said by the United States supreme court in *Meeks v. Olpherts*, that no right of action exists in the heir until the order of distribution. See 100 U. S. 564. It may be answered, there could be or need be no order of distribution, unless there was something to distribute, but, in that event, how could there be any estate to sue for? Of course, there might be instances of inattention and inexcusable

neglect on the part of the administrator that would justify the intervention of the heir, and might warrant the court in tolerating, for the benefit of the estate, the suit in the name of the heir. Even then, however, the heir could only maintain possession for and instead of the administrator, and the property thus recovered would be subject to the payment of the debts of the estate. But it may be further answered that, in this case, there was no administrator, he having been by order of the probate court discharged; but, upon the discovery of this additional property belonging to the estate, as the estate is still heavily indebted, could not and would not the creditors procure further administration, and, the rights of the creditors supervening those of the heir, would they not be paramount?

Our probate law, as well as that of California, much resembles the probate law of Texas. The decisions of the supreme court of Texas, therefore, defining the rights of heirs, the rights of creditors, and of administrators, under her probate law, should have much weight in determining questions like the one before us. In *Giddings v. Steele*, 28 Tex. 748, 91 Am. Dec. 336, in which plaintiff sued not as the grantee of the heir, but as the sole heir of William H. Steele, and claimed to be the absolute owner of the land sued for, the court says: "When there are creditors, or an administrator of the estate, the heirs should not be permitted to sue for and recover property of the estate in their own right, and hold it against the administrator and the creditors, and thus effect a partition of the estate, in whole or part, without satisfying the debts against the estate. It would seem to be a safe rule not to permit the heirs to recover property by suit in their own right, unless they make it appear that the administration has been closed, or that the condition of the estate is equivalent to that, by showing there is no administrator appointed or acting, and that there are no debts against the estate." It should be noted that this decision goes to the extent that, as a condition precedent to the right of the heir to maintain the action, there must not only be no administrator, but there must be no debts unpaid. The legitimate evidence afforded by the probate record of the administration in this case showed the utter insolvency of J. M.

Bryan's estate to the large amount of over \$11,000. Now, to claim that it is not insolvent, but that a large and valuable estate in realty has descended to the heir, through the channel of this self-same administration of said estate,—and certainly it will not be claimed that it could descend through any other channel,—presents to us a glaring solecism. Nor is the solecism lessened by the pretension that the widow and heir of the intestate in this case could and has legitimately and rightfully conveyed the title to this valuable estate, belonging to an insolvent estate, to the plaintiff. The estate could not be solvent and insolvent, the debts could not be paid and unpaid, at the same time. Probate courts move in spheres of equity. The great purpose of administration is, primarily, to pay off the debts of the intestate, that the heirs may come to their inheritance. Within these equitable spheres, the heirs have no right to the inheritance till the debts are paid. Technically, it is true, the estate descends to and vests in the heir; but, within these equitable probate spheres, it is everywhere and always subject, as a condition precedent, to the payment of the intestate's debts. How is it, then, that the heir can claim the estate till the debts are paid? We cannot yield assent, therefore, to the conclusion that the plaintiff made out a *prima facie* case.

At this stage of the proceedings the court, on motion of the defendant and against plaintiff's consent, nonsuited him; and this brings us to a consideration of the next important question in this case, viz., have the district courts of this territory power to grant involuntary nonsuits, where it shall be judicially determined that there is no evidence to warrant the verdict of a jury? This question is an important one, for the reason that its determination settles an important and economic question of practice in this territory till overruled. If the court had this power, we do not doubt it was rightly exercised in this case. The majority of the court, in their opinion herein, deny the power, on the ground that we ought to follow the rule on this subject as established by the United States supreme court; and the supreme court of New Mexico, in *Herreras v. Chaves*, 2 N. Mex. 86, hold to a similar view, even going further; for Mr. Justice Bristol, in delivering the opinion of the court, says: "But, whatever may be the pre-

ponderance of authority among the different states in favor of recognizing and exercising this judicial authority, we are constrained to regard the decisions of the United States supreme court as conclusive, if they cover the case before us; the reason being that an appeal or writ of error lies from the final decrees or judgments of the supreme court of a territory directly to the United States supreme court." In other words, this authority holds that the decisions of the United States supreme court in all cases are binding and conclusive upon this court. We deny the proposition, and contend that in no cases, except where federal questions are involved, are those decisions necessarily binding or conclusive upon us. True, in certain contingencies, appeals or writs of error do lie from the territorial supreme courts to the United States supreme court; but does it follow that that court would hold that the rulings and decisions of territorial supreme courts, upon the laws and statutes of the territories and rules of local practice, should conform invariably to the rulings and decisions of that court? On the contrary, will not the supreme court of the United States adopt the interpretation put upon the territorial laws, and conform to the rules of practice established, by the supreme courts of the territories? Will it contravene these rules of practice, affecting only territorial questions and litigation, simply because they do not conform to its rules of practice, affecting federal questions and litigation? Does it not in all matters, except where federal questions are involved, extend the same considerations for, and conformity to, the decisions of the supreme courts of the territories, involving territorial litigation, as to those of the state supreme courts, involving state litigation, except, forsooth, it be where the organic act or some act of Congress has placed a limitation upon the territorial judiciary? Does it not defer and conform to the rulings of the state supreme courts upon state questions and statutes? Has it ever undertaken to indicate to the states or the territories a code or system of practice? Therefore will the federal supreme court, in passing upon our decisions, adopt the rule of practice established by the supreme court of Arizona, upon the question of granting involuntary nonsuits, or will it inject its own rule on that subject into our system? It seems to us this question can admit of but one

answer. In the case of *Sweeney v. Lomme*, 22 Wall. 213, (a case that went up from the territory of Montana,) Mr. Justice Miller, speaking for the United States supreme court, said: "Without expressing any opinion of our own on the question, we hold that, as it is one which arises under their own Code of Practice, we should, in this conflict of authority, adopt the ruling of the supreme court of Montana in the consideration of it." Now, it is true, by the sixth section of the judiciary act of 1789, the supreme court of the United States can make rules of practice for the district and circuit courts of the United States, which ordinarily would be conclusive upon them; but it is now no longer an open question, that territorial, district, or supreme courts are not United States courts, in the sense of the constitution. "They are not constitutional courts, in which the judicial power conferred by the constitution on the general government can be deposited." The jurisdiction which territorial courts exercise is no part of the vast judicial power of the general government, except so far as the organic act of the territory, and the other acts of Congress relating thereto, may have extended this jurisdictional power. These courts, then, do not come within the purview of the provisions of the judiciary act of 1789, for at that time there were no territories. The supreme and district courts of this territory are simply its legislative courts, created by virtue of its organic act, which came from that power vested in Congress to make all needful rules and regulations for the territories of the United States. The policy of the government is, and has ever been, to allow the largest latitude of local self-government to the territories compatible with the federal constitution and the laws of Congress, and to clothe, by the organic act, each territorial government with the essential habiliments of sovereignty; this being in line with the genius of our government. Under this benign policy, each territory is allowed to build up a system of practice and judicature peculiar to its conditions. And we apprehend that the decisions of the supreme courts of the territories within proper spheres, interpreting the laws of the local governments, and establishing rules of legal practice therein, will receive from the United States supreme court similar recognition to those of state supreme courts upon state laws and practice. True, in the one

there might not be jurisdiction; in the other, there would be; but this difference in judicial attitude would certainly superinduce no distinction in the line and policy of federal decision. Ours is a dual system of government, compassing national and local sovereignty; and, while the territories do not possess some elements of sovereignty which belong to the states, yet, to the extent of legislating upon all rightful subjects of legislation, and administering their own laws, they are sovereign; and while, even within this sphere, Congress might invade their sovereignty and annul their laws, it has never yet done so. Their supreme and district courts possess chancery and common-law jurisdiction, and to these tribunals the United States supreme court will look for the construction of territorial laws, guided by and conforming to the systems of practice established in the territories, respectively. Therefore the federal supreme court will not undertake to say how the judicial power of these territorial tribunals shall be exercised, when the exercise of that power does not impinge upon federal questions.

Now, does the granting of an involuntary nonsuit involve a federal question? Certainly not. It involves simply a question of local practice, and, maybe, the interpretation of a territorial statute. Will it be contended that the United States supreme court holds, or has ever held, that its rules of practice are obligatory upon the territorial courts? Has it ever undertaken to establish a system of judicial practice for the territories at variance with the systems established by their supreme courts? Of course the decisions of that lofty tribunal upon all federal questions—questions affecting the laws or constitution of the United States—are conclusive and supreme; but will it go, has it ever gone, any further? Therefore we do not think the supreme court of New Mexico in the *Chaves* case was concluded by the decision of the United States supreme court in *Elmore v. Grymes*, (see 1 Pet. 469,) because no federal question was involved. The question in the *Chaves* case was the identical question involved here,—that of granting an involuntary nonsuit; and it is well settled that this is purely a question of law, involving a judicial determination of the question as to whether there is any evidence to warrant the verdict of a jury; and, as it is equally well



settled that this does not invade the constitutional right of trial by jury, there could not, therefore, have been any federal question involved. At most, the decision in the Grymes case and similar decisions have only established the rule of practice to be against allowing involuntary nonsuits in federal courts, and we have already seen that ours are not federal courts. Besides, federal courts are not common-law courts. They derive their vast powers from the constitution and the statutes and the boundless domain of equity. Involuntary nonsuit had its origin in the common law. This is possibly the reason that in federal courts involuntary nonsuits do not obtain. There is nothing in federal jurisprudence nor federal legislation requiring the subserviency of territorial courts. In a great opinion, (*Franklin v. Kelley*, 2 Neb. 84,) delivered by Chief Justice Mason of the supreme court of Nebraska in 1872, combating the idea that state courts were bound by federal courts except where federal questions were involved, this language is used: "In these days of federal absorption and state subserviency, this idea is likely to receive a too ready assent. . . . The peer of this court is the supreme court of the United States. Its decisions upon questions arising out of the federal constitution and federal statutes are binding on us; but so, on the other hand, our decisions upon questions arising out of our state constitution and our state statutes are binding upon it. At the same time, upon that wide domain which is presented by general jurisprudence, the federal supreme court and the state supreme court hold an equal and divided jurisdiction. Our opinions are not binding upon it, nor its opinions upon us." We will not forget, however, that the decisions of the federal supreme court upon all questions are of the most exalted authority, and should and will be received with the greatest respect, and even reverence, and given the most careful consideration. Our conclusion, however, is that, in passing upon the question as to the power of the court below to grant an involuntary nonsuit, this court is not concluded by the decisions of the federal supreme court upon similar questions; it being merely a question of practice in the respective jurisdictions. Indeed, we are constrained to hold that, as the great bulk of well-considered American decisions and the positive prepon-

derance of reason favor the doctrine, this power was inherent in the court. The decisions of the state supreme courts in favor of this practice are simply innumerable, and it is not necessary to refer to them. No good reason has ever been given why this power should not, in proper cases, be exercised by the courts, while there are many and unanswerable reasons why it should be. In *Elmore v. Grymes*, the dissenting opinion of Mr. Justice Johnson, fortified as it was by the weight of authority, both in this country and in England, has never been answered. Indeed, is it not unanswerable? Why should not this power belong to the court? What good reason is there for incurring the additional expenses of a new trial, when the same purpose would be subserved by a nonsuit? Is it not a distinction without a difference to say that a defendant may demur to the evidence, and have his demurrer sustained, and yet he cannot move to nonsuit the plaintiff? In other words, that the court has power to sustain a demurrer to the evidence, but cannot grant a nonsuit *in invitum*? That the judge cannot tell the plaintiff, although he may tell the jury, that, in law, he (plaintiff) cannot recover? To us, this is the difference between tweedle-dum and tweedle-dee. One of the glories of the jury system is that there is wisdom in the council of many, but the practical knowledge of this council should be enlightened and guided by law. Why have the jury deliberate in the solution of a question of fact, and bring in a verdict, if, by reason of the law, its action is to be a nullity? Why is it not in accordance with reason that the judge should determine this question of law beforehand? An eminent law writer and jurist has said, with reference to the province of the grand jury, that in many cases it is a judicial White Friars, "whose privilege of sanctuary is pernicious to the best interests of society"; and with equal pertinency these remarks might often be applied to the province of the trial jury, for under both "the number of new trials, of frivolous appeals, and the consequent delays of justice have become an absolute reproach to the law." In *Pratt v. Hull*, 13 Johns. 334, it seems to us the supreme court of New York has put this question beyond cavil. It says: "The answer to this abstract question cannot admit of a doubt. This must be a power vested in the court. It results necessarily from their

being made the judges of the law of the case, when no facts are in dispute. . . . It was a pure question of law whether, under a given state of facts, the plaintiff was in law entitled to recover; and, unless this was a question for the court, there is no meaning in what has been considered a salutary rule in our courts of justice, that to the questions of law the judges are to respond, and to questions of fact, the jury." This question is both interesting and important, not only to the courts of this territory, but to the bar and litigants. We are establishing a rule of practice,—one that on its affirmative side has the elements of economy in it. One of the demands of the hour is, how to economize in the administration of our laws; and, as reason and common sense strongly support this rule, we think it would be judicious to incorporate it into our system of practice. Hence we are of the opinion that the judgment of the district court should be affirmed.

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[Civil No. 253. Filed February 13, 1889.]

[20 Pac. 607.]

T. L. STILES, Assignee, Defendant and Appellant, v. M. G. SAMANIEGO, Plaintiff and Appellee.

1. CORPORATIONS—CREDITOR'S BILL—STOCKHOLDERS—UNPAID SUBSCRIPTIONS—PLEADINGS.—A complaint which alleges the recovery of certain judgments against a corporation while the subscriptions of H. and T. were vital and unpaid, and that execution thereon against its property had been returned *nulla bona*, states a sufficient cause of action in that connection to reveal the liability of H. and T. and hence the assignee of their estates.
2. PLEADING—NONJOINDER—WAIVER—COMP. LAWS ARIZ., CHAP. 48, SEC. 40, P. 415, CITED.—The objection that there was a nonjoinder of a necessary party should be taken either by a demurrer or an answer, and, this not having been done, that objection must be deemed waived. Statute, *supra*.
3. ASSIGNMENT FOR BENEFIT OF CREDITORS—CREDITORS—LIEN—ASSIGNOR'S INTEREST TERMINATED—NECESSARY PARTIES—CREDITOR'S BILL.—By virtue of an assignment every *bona fide* creditor of the assignor has, in equity, a *quasi* lien upon the estate assigned, *pro rata*

of his debt, as was collectible under the terms of the assignment. The assignment being general for the benefit of creditors, the assignors being insolvent, ceased by virtue of the assignment to have any further interest in the estate assigned, for by its terms, if there was any estate remaining, after paying the individual debts of the assignors, it was to be applied to liquidating the partnership debts of the firm of H. & Co. Therefore H. and T., assignors, were not necessary parties.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge. Generally affirmed.

The facts are stated in the opinion.

J. A. Anderson, and Haynes & Mitchell, for Appellants.

The complaint does not state facts sufficient to constitute a cause of action, nor the findings facts sufficient to warrant a decree.

Nothing is stated or found which would authorize any judgment against the assignee. An assignee may be compelled in equity to distribute the trust fund among the creditors, but in the absence of a statute providing a method of proving a debt, he cannot be sued for that purpose without joining his assignor. There is not a mere nonjoinder of a necessary party, but a total failure to state a cause of action against the party sued. The complaint shows that no indebtedness existed in favor of the plaintiff or his assignors, either immediate or remote, against Toole or Hudson at the time of the assignment by them to defendant Stiles, nor until the return of the execution against the railroad company, *nulla bona*, nearly three years after the assignment.

The complaint alleges that "Hudson and Toole being insolvent on the ninth day of May, 1884, made a *general assignment* for the *benefit of their creditors*." This assignment inured to the benefit of those only who were *creditors*, and the property and assets assigned can be applied only to the payment of *debts* then existing. *Railroad Co. v. Burnside*, 5 Exch. 129; Burrill on Assessments, p. 647, sec. 427 (4th ed).

A debt is "a sum of money due by certain and express agreement." "The distinguishing and necessary feature is,

that a fixed and specific quantity is owing, and no future valuation is necessary to settle it." Bouvier's Law Dictionary, title "Debt."

A subscription for railway shares does not create a debt within the meaning of the bankrupt law, or law relating to assignments, until calls are made, and the bankrupt or assignor is liable for calls made after the assignment, and the assignee is not. *Railroad Co. v. Burnside*, 5 Exch. 129; *American File Co. v. Garrett*, 110 U. S. 288, 4 Sup. Ct. Rep. 90; Burrill on Assessments, p. 647.

No action can be maintained against Stiles upon the subscription of Hudson or Toole to compel the payment of any part thereof, because these subscriptions did not pass to him by the assignment, and he is not the owner of them either as trustee or otherwise. Laws of Arizona 1879, p. 91, secs. 11 and 12; *Midland G. W. Ry. v. Gordon*, 16 Mees & W. 804.

Neither the railroad company nor its creditor, the plaintiff, have any lien upon the assets of either Hudson or Toole's estate. This proceeding is therefore not *in rem*, and the presence of Toole and Hudson as defendants, is essential; for if the decree in this case would not be valid against them personally, if they should return to this territory, it cannot be valid against their assignee.

Jeffords & Franklin, for Appellee.

When Toole and Hudson subscribed to the capital stock of the Tucson and Gulf of California Railroad Company they became debtors of the corporation to the amount of the subscription, \$10,000 each. This was in 1882. On May 8, 1884, the date of their assignment to T. L. Stiles, this subscription was still unpaid. It was a debt due from them to the corporation; it was one of the debts for the payment of which they assigned their property to T. L. Stiles; for, as said by the supreme court of the United States, "by his subscription each subscriber becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription." *Hatch v. Dana*, 101 U. S. 205-215. And again: "It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation

must pay his subscription if required to pay the obligations of the corporation. . . . After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished." *Hawley v. Upton*, 102 U. S. 314.

The debt of Hudson and Toole was a debt due from them to the corporation, and it was the duty of Mr. Stiles to pay that debt, as well as other debts, when called on, to extent of the assigned property.

The railroad company is indebted to the plaintiff, Samaniego, but is insolvent. Under these circumstances plaintiff could bring an action in equity to compel it to call in its unpaid subscriptions, so as to pay his debt. Or he could bring suit directly against one or more of the subscribers and directly compel payment to himself of the unpaid subscription, or as much thereof as would be necessary to pay his debt.

This has been specifically decided in *Hatch v. Dana*, 101 U. S. 205, and it is under the authority of that case that the present action was brought.

The court said: "The liability of a subscriber for the capital stock of a company is several, not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. . . . A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished." *Hatch v. Dana*, 101 U. S. 205. See, also, *Ogilvie v. Knox Ins. Co.*, 22 How. 380-392.

The record shows that the point of nonjoinder of parties in not making Hudson and Toole defendants, was not raised in the court below. It was not raised by demurrer or answer. There is no bill of exceptions to that point, nor is it assigned as error. This court cannot consider the question.

WRIGHT, C. J.—This suit was brought against the appellant, Stiles, to recover a judgment against him, as the assignee of Charles Hudson and James H. Toole, and also as assignee of the firm of Hudson & Co., and against certain

other stockholders in the Tucson and Gulf of California Railroad Company. In 1882, in the month of January, Charles Hudson and James H. Toole each subscribed for one hundred shares of stock in the said corporation, known as the "Tucson and Gulf of California Railroad Company," of the aggregate value of \$10,000. On the above subscription each of the above-named subscribers, Charles Hudson and James H. Toole, paid about \$691, leaving the balance unpaid. In May, 1884, the said Hudson and Toole, being insolvent, each made an individual and general assignment to the appellant, Stiles, of all his property, for the benefit, first, of his individual creditors, and then for the general benefit of the creditors of the firm of Hudson & Co., of which firm they were the sole members. Contemporaneously with this assignment, the firm of Hudson & Co. made a general assignment, also to the said appellant, Stiles, for the benefit of their creditors. In 1886 one Lazard obtained, in the district court of Pima County, a judgment against said railroad company for the sum of \$6,220.50, and in the same year one Parker obtained a judgment against the corporation for the sum of \$2,206.50. In March, 1887, and after executions had been duly issued on these judgments, respectively, and returned *nulla bona*, they were sold and assigned to appellee herein, who now sues to subject whatever individual estate of the said Hudson or Toole there may be in the hands of said Stiles, as such assignee, to the payments of appellee's demand.

The complaint is substantially a creditors' bill in equity, demanding general relief, but seeking to subject a certain fund belonging to the individual estate of the assignor Toole in the hands of the assignee to the satisfaction of complainant's judgments. The case was tried by the court sitting as a jury. The court found the facts substantially to be that Charles Hudson and James H. Toole subscribed the said amounts of stock to said railroad company at the time alleged, and had paid but said small portion thereof; that they made said individual and firm assignments to Stiles, the appellant; that the assignee accepted the trust, etc.; that Samaniego, the plaintiff and appellee, is now the *bona fide* owner of said judgments against said railroad company, having purchased the same from said Lazard and Parker; that the said assignee,

Stiles, had paid out to the creditors of the firm of Hudson & Co. funds belonging to the individual estate of said James H. Toole, amounting to about the sum of \$5,489.18; that said assignee, Stiles, had in his hands, however, enough of assets belonging to the estate of Hudson & Co. to pay back to said Toole's estate said amount; and that each of the defendants was liable to plaintiff and appellee, by reason of the said subscriptions to said railroad company, to an amount equal to appellee's demand, viz., the sum of \$8,427, except Goldschmidt, who was not found liable at all, and Steinfeld, who was found liable only to the amount of \$885.

These facts were essentially as they had been alleged in the complaint. But the defendant and appellant, Stiles, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that it did not show that the judgments of said Lazard and Parker were recovered upon any indebtedness due from the said Tucson and Gulf of California Railroad Company; that, at the respective dates of said judgments, the complaint did not show that the said Toole or the said Hudson was still a stockholder in said railroad company; that said complaint showed on its face that the said assignments of the said Charles Hudson and James H. Toole were made for the benefit of their creditors, they being insolvent; that said railroad company was not entitled to share in the benefits thereof; that neither said Lazard nor said Parker was on the ninth day of May, 1884, (the date of said assignments,) a creditor of said corporation, or of said Hudson or Toole, and therefore neither of them was entitled to share in the benefits of said assignment. The other defendants, Steinfeld, Tritle, and Goldschmidt, filed a very general denial; but the said assignee, Stiles, under our peculiar practice act, that requires the demurrer, answer, etc., to be all put in one pleading, filed, not only a more serious and elaborate original answer, but also a more extended and critical amended answer, and subsequently a most exhaustive cross-complaint; so that the party who waged the serious conflict below and the real appellant here is the said Stiles, as assignee, under said assignments.

The first question raised by the demurrer, that the complaint did not state facts sufficient to constitute a cause of



action, because it did not show that, at the time Lazard and Parker obtained their judgments against the Tucson and Gulf of California Railroad Company, the said company was indebted to them, we think is not tenable. These judgments were obtained in the district court of Pima County, and, in the absence of something appearing on the face of the complaint to the contrary, the presumption is conclusive that they were obtained upon *bona fide* demands. These judgments imported absolute verity; and the complaint having alleged their recovery, while the subscriptions of Hudson and Toole were vital and unpaid, and that executions thereon against the property of said railroad company had been returned *nulla bona*, a sufficient cause of action was stated, in that connection, to reveal the liability of said Hudson and Toole, and hence of the assignee of their estates.

The objection that there was a nonjoinder of a necessary party should have been taken either by demurrer or answer, and, neither having been done, that objection must be considered as waived. See Comp. Laws Arizona, ch. 48, sec. 40, p. 415.

But even if the objection had been made, in one of the modes pointed out by the statutes, we cannot see that it should have been availing. By virtue of the assignments, every *bona fide* creditor of the assignors at the time of the assignments had, in equity, a *quasi* lien upon the estates assigned, *pro rata* of his debt, as was collectible under the terms of the assignments. These assignments being general, for the benefit of creditors, the assignors, Hudson and Toole, being insolvent, ceased, by virtue of the assignments, to have any further interest in the estates assigned; for by the terms of said assignments, if there was any estate remaining, after paying the individual debts of the assignors, it was to be applied to liquidating the partnership debts of the firm of Hudson & Co. In such a case, contingencies might arise in which there would still be something remaining, in which event an interest would revert to the assignors. They might then become necessary parties. But no such case is presented here, and we are unable to see why Hudson and Toole, the assignors, are essential parties. The court had undoubted jurisdiction over the assignee and the trust-estates in his hands.

The other question raised by the demurrer is, in substance, this: that, at the time of the assignments, in May, 1884, the Tucson and Gulf of California Railroad Company was not a creditor of either Hudson or Toole; and, the said assignments being for the benefit of those only who were creditors at the time they were made, therefore the said railroad company was not entitled to the benefits thereof. Upon this proposition the appellant's learned counsel make a subtle and elaborate argument. They say that the property and assets assigned can only be applied to the payment of debts existing at the time of these assignments, and that a subscription for railway shares does not create a debt, within the meaning of the law relating to assignments, until calls are made, and that, if calls are made after the assignment, the assignor, and not the assignee, is individually liable.

We entertain no doubt whatever that, at the time these assignments were made,—as the law is now well established,—both Hudson and Toole were debtors of the Tucson and Gulf of California Railroad Company, and that said railroad company was entitled to the benefits of the assignments which they made. Whatever may have been the views of the older law writers and decisions, as to whether or not a subscription of the capital stock of a corporation was a debt, the trend of modern adjudication seems to have been steady towards regarding it as a debt; as much so as a promissory note, or other liquidating demand. Suppose that, instead of a subscription, each of the assignors had executed to said railroad company his promissory note for the sum of \$10,000, will it be pretended that the judgment creditors of the railroad company, after executions on their judgments had been unavailing, could not have garnished the makers of the notes, and attached the debts represented by them in the hands of the debtor? Well, when Hudson and Toole made the assignments, if they had made these notes, instead of their subscriptions, would not the payees of the notes have been existing creditors entitled to the benefits of the assignments? And would not the judgment creditors of the payees of the notes be entitled to be subrogated to the rights of the said payees? And if, as makers of the notes, they would be liable as debtors of the corporation, would not their assignee, when they made an

assignment for the benefit of their creditors, be liable in their stead?

In the case of *Ogilvie v. Knox Ins. Co.*, 22 How. 380, the United States supreme court said: "As stockholders, who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors to the corporation for the several amounts due by each of them. As to them, this bill is in the nature of an attachment, in which they are called on to answer as garnishees of the principal debtor."

And in *Hatch v. Dana*, 101 U. S. 205, the federal supreme court said: "By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers, and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation." And the court, in this same decision, quote approvingly *Henry v. Vermilion etc. R. Co.*, 17 Ohio 187, where it said: "When a company, being insolvent, as in this case, abandons all action under its charter, the original mode of making calls upon the stockholders cannot be pursued. The debt, therefore, from that time must be treated as due without further demand." And then Mr. Justice Strong adds: "This means, of course, as between the debtor and the creditor of the corporation."

In equity it is not essential that calls shall have been made, in order to obtain relief, where the affairs of the corporation have been put into process of liquidation. Calls are simply one step towards payment or the collection of stock subscriptions, when the corporation is in full operation under this charter. A court of equity, however, can enforce the payment of these subscriptions whether calls have been made or not.

Nor do we think the court erred in sustaining the demurrer to the cross-complaint. This was not a suit to wind up the affairs of the Tucson and Gulf of California Railroad Company, but a suit to collect certain judgment demands against the company, and to subject a certain trust fund, belonging

to an assigned estate of one of the subscribers to the said company, in the hands of the assignee, to satisfy these judgment demands. To us it is clear that this suit could have been maintained against Stiles, as the assignee of Charles Hudson, alone, or as assignee of James H. Toole alone, or against any other single one of the subscribers to said railroad company. In such cases, there is no misjoinder of parties because all the subscribers are not brought into the suit. Because the debt might be made out of some other stockholder is no reason why the one sued, or his representative, should not pay the amount of his subscription. We think, therefore, the judgment of the court below should be generally affirmed. There is, however, the technical error. The minute entries show that the suit was dismissed as to the defendant F. A. Tritle, yet there is a decree for \$8,427 entered up against him. This was manifestly an oversight. The cause will therefore be reversed and remanded, with instruction to amend the decree by striking out the name of F. A. Tritle as a defendant.

Porter, J., and Barnes, J., concur.

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[Civil No. 229. Filed February 15, 1889.]

[20 Pac. 673.]

GEORGE F. MARTIN, Plaintiff and Appellee, v. WELLS, FARGO & CO., Defendant and Appellant.

1. **APPEAL AND ERROR—UNCONTRADICTED EVIDENCE—VERDIOT.**—Plaintiff, defendant's agent, was suddenly injured and incapacitated for work for several weeks, during which time the office was in charge of other employees of defendant, who failed to check up or count the plaintiff's cash for two or three weeks after the injury. They then claimed plaintiff \$800 short, which plaintiff paid; but upon recovery he examined the books and asserted that he had paid out money to the company and for the company for which they should reimburse him. He testified that on the day of his injury there was \$2,300 in the safe. It is admitted that if this were so he was not short, and that the amount recovered is due him. There being

no evidence to dispute his statement, the verdict of the jury based thereon should not be disturbed on appeal.

2. **MONEY HAD AND RECEIVED.**—Where plaintiff holding funds belonging to defendant uses his own funds to pay defendant's obligations, he is entitled to recover the money so paid, he having in the mean time surrendered all funds of defendant's to another of its agents.

**APPEAL** from a judgment of the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge. **Affirmed.**

The facts are stated in the opinion.

Jeffords & Franklin, for Appellant.

Cameron H. King, and George L. Hood, for Appellee.

**PORTER, J.**—Plaintiff, Martin, was agent for defendant at Tucson. He brings suit for two causes of action: (1) For money paid out by him for the benefit and use of defendant; (2) for money paid to defendant by a mistake. There is some conflict in the evidence, but there is evidence tending to show that on the afternoon of July 17, 1884, plaintiff received a severe injury, by which he was suddenly rendered incapable of doing any business whatever for several weeks. A new clerk took charge of the office, and that night Mr. Taylor, a route agent of defendant, reached Tucson, and took control of the office, carrying on the business. Neither he nor the clerk "checked off" the office, nor counted the cash in the safe, for two or three weeks, when they found it short over \$800, and, calling Martin's attention to it, Martin made it good. As soon as Martin was able to do business, he caused an examination of the books to be made, and he claimed that he had paid out money to the company and for the company, for which they should reimburse him. He testified that on the day of his injury there was \$2,300 in the safe. It is admitted that if this were so he was not short in his accounts, and that the amount recovered is due him. There is no evidence to dispute his statement. The office was carried on by Boer and Taylor some three weeks, and there is as much reason to think the shortage occurred after as before Martin's injury. They certainly were careless in not checking up the office and count-

ing the cash as soon as they took charge of it. The jury found with Martin that the money was there when he was injured. There was evidence to sustain this finding, and the verdict should not be disturbed on appeal.

Before Martin's injury, in the ordinary course of business he received a telegraphic order from the company's agent in New York to pay one Hoyt \$2,000. This he did, but, to meet it, he borrowed of one Griffith \$1,000. The company got the benefit of this payment, and Griffith was paid by Martin. It is argued that he should have paid it out of the \$2,300 he alleges was in hand at the time of his injury. This may be so, but if it were there, as he says, and as the jury finds, then that money came into the hands of Taylor, the general agent of defendant; and if it were lost or stolen thereafter it was not Martin's fault, and he should not be held responsible for anything that occurred in this office after Taylor took charge of it. The contention in this case was over the question whether it was there; defendant insisting that it was not. As Taylor did not count the cash, there was no evidence to contradict Martin's testimony that the amount was there.

We have examined the instructions given. They are somewhat voluminous, but we think they correctly charged the jury. We perceive no error in the record, and the judgment is affirmed.

Wright, C. J., and Barnes, J., concur.

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[Civil No. 245. Filed March 7, 1889.]

[73 Pac. 399.]

PIMA COUNTY, Plaintiff and Appellee, v. J. H. MARTIN,  
Defendant and Appellant.

1. OFFICERS—TERRITORIAL COURTS—CLERK OF COURT—FEES—POWER OF LEGISLATURE.—The clerk of the district court is not entitled in all cases to the fees as prescribed by the statutes of the United States. The legislature has power to fix a salary for the business of the territorial court, having complete control of all cases except those in which the United States is a party.

**APPEAL** from a judgment of the District Court of the First Judicial District in and for the County of Pima William H. Barnes, Judge. **Affirmed.**

Haynes & Mitchell, for Appellant.

H. R. Jeffords, and S. Franklin, for Appellee.

**BARNES, J.**—Martin is clerk of the district court of the first judicial district. His contention is that as such clerk he is entitled in all cases to the fees as prescribed by the statutes of the United States, and that the legislature, by fixing a salary for the business of the territorial court, exceeded its power. We think not. The legislature has complete control of all the cases except those in which the United States is a party.

The judgment of the district court is affirmed.

All concur.

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[Criminal No. 47. Filed March 14, 1889.]

**TERRITORY OF ARIZONA**, Plaintiff and Respondent, v.  
**EDWARD M. DOOLEY**, Defendant and Appellant.

1. **CRIMINAL LAW—CONTINUANCES—AFFIDAVITS—UNCERTAINTY—GRANTING DISCRETIONARY—APPEAL AND ERROR—REVIEWED ONLY WHEN REFUSAL UNJUST.**—When affidavits for continuance fail to state that the party expects to procure the testimony of the witnesses at any time, with such uncertainty, a criminal case ought not to be continued. A continuance in a criminal action rests in the sound discretion of the court and will not be reversed except in cases manifestly arbitrary and unjust.
2. **TRIAL—EXCLUSION OF WITNESSES.**—The exclusion of witnesses is solely a matter of discretion.
3. **CRIMINAL LAW—EVIDENCE—PREVIOUS CONVERSATION BETWEEN PROSECUTING WITNESS AND DEFENDANT.**—A defendant will not be permitted to testify as to a conversation between the prosecuting witness and himself three hours before the alleged assault.
4. **SAME—JURY—IMPEACHING VERDICT.**—A jury cannot impeach their own verdict by a showing that in their deliberations they arrived at their verdict by some of them being persuaded that the punishment would be light.

5. **SAME—SAME—CUSTODY—SWORN OFFICER.**—There is no provision of the criminal statutes requiring an officer in charge of the jury to be sworn.
6. **SAME—APPEAL AND ERROR—INSTRUCTIONS TO JURY—FAILURE TO INSTRUCT JURY—REQUEST MUST BE MADE OR ERROR WAIVED.**—Where the court did not charge the jury that they could render a verdict for an assault with a deadly weapon, or any less offense, the defendant, not having asked for such instruction, cannot take advantage on appeal of the failure so to instruct, though a refusal on request would have been error.

**APPEAL** from a judgment of the District Court of the First Judicial District in and for the County of Pima. W. H. Barnes, Judge. Affirmed.

Hood and Webb, for Appellant.

Clark Churchill, Attorney-General, and H. R. Jeffords, for Respondent.

**PER CURIAM.**—Defendant-appellant was indicted and tried in the county of Pima for an assault with intent to murder. The first assignment of error was that the court refused to grant a continuance. The affidavits do not state that he expected at any time to procure the testimony of the witnesses. With such an uncertainty, a criminal case ought not to be continued. A continuance in a criminal action rests in the sound discretion of the court, and will not be reversed except in cases manifestly arbitrary and unjust. *Brown v. State*, 85 Tenn. 439, 2 S. W. 895.

The second assignment of error is the refusal of the trial judge to exclude the witnesses. This is solely a matter of discretion.

The third assignment is refusal of the court to allow defendant to testify to a conversation between prosecuting witness and himself three hours before the alleged assault. We do not think such conversation admissible. A previous fight would not have been allowed to be proven by the defense.

Exceptions were taken that the jury in their deliberations arrived at their verdict by some of them being persuaded that the punishment would be light. It is well understood that juries cannot thus impeach their own verdict.

Another exception is that the jury was not all of the time



in custody of the officer sworn in court. Another officer was in charge of the jury part of the time, who, before taking charge, was sworn by the clerk. There is no provision of the criminal statutes requiring an officer to be sworn; it is usually done. In this case, deputy sheriffs had charge of the jury.

Exception is taken because the court did not charge the jury that they could render a verdict for an assault with deadly weapon or any less offense than that charged. Had the court refused to so charge, there would have been error; but no such instruction was asked for by the defendant, and he cannot now take advantage of there being no instruction on that point.

The judgment is affirmed.

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[Civil No. 240. Filed March 14, 1889.]

[20 Pac. 803.]

JOHN ANDERSON, Plaintiff and Appellee, v. J. E. THOMPSON et al., Defendants and Appellants.

1. MORTGAGES—FORECLOSURE—OCCUPANTS—ESTOPPEL BY ACTS—POSSESSION—REMEDIES—WRIT OF ASSISTANCE.—A decree of foreclosure had been rendered against the mortgagors of a piece of land, but after sale appellants were in possession and refused to vacate. Appellants derived possession from the mortgagors after the execution of the mortgage, and with full knowledge thereof, and had been parties to the foreclosure proceedings, but at their instance, and upon their disclaiming any interest under their deed, the cause was dismissed as to them. They now repudiate their disclaimer by remaining in possession and setting up an after-acquired title by homestead entry. Having obtained possession from the mortgagors, they are in privity with them, as their grantors, and their right of possession is subordinate to the right of the mortgagee. *Held*, the writ of assistance was properly awarded. Compare *Singer Manufacturing Co. v. Tillman et al.*, *post*, p. 122, 21 Pac. 818.

PORTER, J., dissents.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Hereford & Lovell, for Appellants.

The mortgage from Moore and wife to respondent did not convey the legal title. Comp. Laws of Arizona, p. 450, secs. 262, 263, 264.

The debtor or redemptioner has six months after sale within which to redeem. Comp. Laws 1877, p. 445, sec. 233, and p. 446, secs. 237, 238. The right of redemption cannot be waived. *Goodenow v. Ewer*, 16 Cal. 467, 76 Am. Dec. 540.

The decree of foreclosure was rendered under the law as it existed, before the revised statutes of the territory took effect, and provided: "That the sheriff, after the time allowed by the law for redemption, has expired, execute a deed to the purchaser, for the premises," etc.

The legal title does not pass on foreclosure and sale, but only on execution of sheriff's deed. *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655, note; *Goodenow v. Ewer*, 16 Cal. 467, 76 Am. Dec. 540; *Page v. Rogers*, 31 Cal. 494.

The mortgagor has the right of possession until the execution of sheriff's deed. *Sands v. Pfeiffer*, 10 Cal. 258; *Makovich v. Wemple*, 16 Cal. 104.

The purchaser is not entitled to a writ of assistance until after his receipt of the sheriff's deed. *Montgomery v. Middlemiss*, 21 Cal. 107, 81 Am. Dec. 146.

No person in possession of the premises claiming title thereto at the commencement of the action can be dispossessed unless he was made a party to the suit, so as to be bound by the judgment. Freeman on Executions, par. 475; *Howard v. Kennedy*, 4 Ala. 592, 39 Am. Dec. 307, note; *Clark v. Parkinson*, 10 Allen, 133, 87 Am. Dec. 628; *Ford v. Doyle*, 37 Cal. 346; *Rogers v. Parrish*, 35 Cal. 127; *Tevis v. Ellis*, 25 Cal. 515; *South B. L. A. v. Christy*, 41 Cal. 501; *Calderwood v. Pyser*, 31 Cal. 333; *Garrison v. Savignac*, 25 Mo. 47; *George v. Hufschmidt*, 44 Mo. 179; *Powell v. Lawson*, 49 Ga. 290; *Terrell v. Allison*, 21 Wall. 298.

A writ of assistance should only be issued when the defendant has been made a party to the foreclosure suit, and is concluded by the proceedings therein, and refused to deliver possession. *Enos v. Cook*, 65 Cal. 175, 3 Pac. 632.

In a foreclosure suit, a homestead having been declared subsequent to the execution of the mortgage, the wife is a necessary party to the suit, and not having been made so, a writ of assistance will not lie against either her or her husband, the mortgagor. *Hefner v. Urton*, 71 Cal. 479, 12 Pac. 486.

The writ of assistance could not issue against appellants for the reason that the action had been dismissed by the decree of the court. "The writ can only issue against the defendants and parties holding under them who are bound by the decree." *Burton v. Leese*, 21 Cal. 87. After the judgment and dismissal the appellants were no longer interested parties to any subsequent proceedings under the decree against the Moores, and the writ was improvidently issued as against the appellants. *McLean v. McNamary*, 60 Cal. 610.

The court had full jurisdiction of the parties and of the subject-matter in the suit of foreclosure, it rendered its findings and decree upon the merits of the case after a full hearing; that decree, though it may have been erroneous, cannot be attacked collaterally. "If the court had jurisdiction to render the judgment no error or irregularity in the proceedings will render it void, nor can such errors or irregularities be considered when the judgment is collaterally questioned." *McGoon v. Scales*, 9 Wall. 23; *Kemp v. Kennedy*, 5 Cranch, 173; *Thompson v. Tolmie*, 2 Pet. 157; *Voorhees v. Bank of United States*, 10 Pet. 449; *Sargeant v. Bank of Indiana*, 12 How. 371; *Merchand v. Frellsen*, 105 U. S. 423.

The judgment of dismissal is conclusive against the appellee. It establishes the paramount and adverse title of appellant J. E. Thompson, and appellee cannot try his title in the proceeding to obtain a writ of assistance. *Menderson v. McTucker*, 45 Cal. 649.

The judgment of dismissal as to J. E. Thompson was final and conclusive against appellee for all of the purposes of that action. *Dowling v. Pollack*, 18 Cal. 626.

"A dismissal of an action is in effect a final judgment in favor of the defendant. It is a final decision of the action against all claims made by it, although it may not be a final determination of the rights of the parties, as may be presented

in some other action." *Leese v. Sherwood*, 21 Cal. 164; *Freeman on Judgments*, 3d ed., pars. 17, 270, and cases cited.

A dismissal of the plaintiff's suit, upon the merits, is as conclusive upon the rights of the parties as any other judgment that might have been rendered. *Parrish v. Ferris*, 2 Black, 606; *Durant v. Essex Co.*, 7 Wall. 107.

The rule holds true, although the second bill contains additional allegations, etc. *Case v. Beauregard*, 101 U. S. 688.

A fact which has been directly tried and decided by a court of competent jurisdiction cannot be controverted again collaterally between the same parties in the same or any other court. *Hopkins v. Lee*, 6 Wheat. 109; *Penkallow v. Doane*, 3 Dall. 54; *Elliot v. Piersol*, 1 Pet. 328; *United States v. Nourse*, 9 Pet. 8; *Bank v. Beverly*, 1 How. 134; *Randall v. Howard*, 2 Black, 585; *Cromwell v. Sac County*, 94 U. S. 351.

A judgment upon the facts in issue, which appear upon the record, either expressly or by necessary intendment, or which are shown *aliunde* to have been in issue, is conclusive upon the parties and privies as to such facts. *Chapman v. Smith*, 16 How. 114.

Earl H. Webb, and Jeffords & Franklin, for Appellee.

The purchaser of the mortgaged premises obtains whatever title was in the mortgagor at the instant of time he executed the mortgage, and the grantee of the mortgagor takes subject to the mortgage. *Belloc v. Rogers*, 9 Cal. 126.

The appellants as grantees and privies of the mortgagor are estopped from saying the land was public land, and that a mortgage on said lands and improvements would be void. *Hoffler v. Maier*, 13 Cal. 13.

The defendants Thompson were dismissed because they claimed no interest in the premises through the deed from Moore. This is the sole ground upon which they were dismissed. If they had been dismissed by reason of a subsequent and paramount title, J. E. Thompson would have been dismissed, and J. H. Thompson held, for the reason that the alleged subsequent title was in J. E. Thompson, and not in both. The Thompsons were privies with the mortgagors, came in under Moore, and cannot attack Moore's title until they

first put the owner of that title in possession. *Jackson v. Spear*, 7 Wend. 401.

WRIGHT, C. J.—This case is brought here on an appeal from an order of the district court of Graham County granting a writ of assistance in favor of the appellee, John Anderson; said Anderson being mortgagee, and one Peter Moore and wife being mortgagors, in a certain mortgage to the premises, the right to the possession of which constitutes the controversy herein.

From the facts in evidence, it seems that a decree of foreclosure had been rendered against the mortgagors, and a sale was had thereunder, but after the sale it was made to appear that the appellants were in possession of the premises and refused to surrender them; that appellants derived possession of the premises from the mortgagors, Moore and wife, after the execution by them of said mortgage, and with full knowledge thereof; and that they (the said appellants) had been parties to the original foreclosure suit, but that at their instance, and on their disclaiming any right or interest under their deed, an order had been made dismissing the claim as to them. Appellants now repudiate the disclaimer, by remaining in possession of the premises under their said deed from Moore and wife and refusing to surrender. Under these circumstances, the court below awarded a writ of assistance; and the question for us to determine is, was that action of the court proper?

A writ of assistance will not run against strangers, because the rights of parties who are strangers to the most solemn record remain unaffected thereby; but this writ is the usual and proper remedy against mortgagors and their privies,—those who obtain possession under them, and more particularly those who are parties to a suit in which they could have asserted and maintained all their rights. The vital question here now is the one of the right of possession. Other rights and equities may arise hereafter.

One who buys land upon which there is a valid mortgage takes it subject to the superior equities of the mortgagee; and if, prior to his second purchase, he has gained possession thereof by virtue of a conveyance from the mortgagor, his

right of possession is subordinate to the equities of the mortgagee. In the case at bar the appellants asked to be dismissed, in their answer disavowing any right or interest in the premises by virtue of their deed from Moore and wife. This was done. Now, however, they set up a title acquired under the homestead laws of the United States after they have obtained possession of the premises from Moore by and under said deed. This homestead entry was based upon their possession thus obtained under said deed from Moore and wife, and, if it can be asserted, will defeat the mortgage, subject to the equities of which they entered and now hold.

Such a fraudulent transaction as this ought not to be, and we think in law and justice cannot be, upheld. Having obtained possession of the premises from Moore and wife, they are in privity with them, as their grantors, and their right of possession cannot be held as paramount to the right of the mortgagee, the appellee herein. See *Asher v. Cox*, 2 Ariz. 71, 11 Pac. 44; *Watkins v. Jerman*, 36 Kan. 464, 13 Pac. 798; *Bell v. Birdsall*, 19 How. Pr. 491.

The writ of assistance, we think, was a proper remedy in this case, and was properly awarded. It is not necessary to pass upon other questions involved.

The judgment of the district court is affirmed. So ordered.

Barnes, J., concurs.

PORTER, J., dissenting.—Appellee brought a foreclosure suit in Pima County against Peter and Martha E. Moore, alleging that appellants claimed an interest in the mortgaged premises. Appellants disclaimed any interest in one quarter section, but set up claim to the other quarter section by virtue of homestead under the laws of the United States, and also claimed two thirds of a certain ditch as appurtenant thereto.

The findings are that, at the time the Moores executed the mortgage, they were living on the land, and were the owners of the fixtures and improvements thereon, including a two-thirds interest in the Clanton Ditch, and were in possession of the same; that the said lands were government lands, and at the time were reserved from pre-emption and homestead entry,

being within the Texas and Pacific Railroad grant; that afterwards, on or about January 21, 1885, and prior to the restoration of said lands for settlement under the pre-emption and homestead laws, the Moores sold by quitclaim deed to the Thompsons all their right to the southeast  $\frac{1}{4}$  of section 35, and their two-thirds interest in the ditch, and gave immediate possession, and appellant J. E. Thompson with his family has resided upon the premises ever since; that on the 1st of May, 1885, the premises having been restored to the government for pre-emption and homestead settlement, J. E. Thompson made entry and received certificate thereof; that he duly qualified to make said entry. J. E. Thompson disclaimed all interest in any part of the land. Attorney for appellee dismissed as to the Thompsons. Findings were also that J. E. Thompson claimed an interest in the ditch as appurtenant to the land. The judgment was that the action be dismissed as to the Thompsons, as they claim no title or interest by virtue of the deed from the Moores. By the judgment, all the interest of the Moores was ordered to be sold.

Plaintiff made application to the district court for a writ of assistance, and showed the sheriff's deed to him on the foreclosure suit, and his demand for the premises, and refusal to deliver possession. By consent of parties, the complaint, answer, findings, and decree in the foreclosure suit were put in evidence on the hearing of the petition for the writ, and also the evidence of delivery of possession of southeast  $\frac{1}{4}$  of section 35 to J. E. Thompson. Appellee excepted to the evidence relating to subsequently acquired title as immaterial and incompetent. The court made an order granting the writ as prayed for, from which order the appeal is taken.

I do not deem it necessary to discuss the question raised in regard to the execution of the sheriff's deed before the time of redemption had passed, or whether there was any right of redemption, or whether the decree of foreclosure was final and conclusive against appellant, and barred any proceeding thereunder. The Thompsons, it is true, were made parties to the foreclosure suit; but the decree dismissing the case as to them, they claiming no right, title, or interest by virtue of the deed from Moore and wife, at least puts the case in the same condition as though they never had been made parties. The

dismissal is no adjudication of their rights as to their alleged paramount title. Through a writ of assistance upon affidavits and motion courts will not settle the legal or equitable rights of persons not parties to the foreclosure suit. As said in *Terrell v. Allison*, 21 Wall. 289: "But the writ of assistance can only issue against parties bound by the decree, which is only saying that the execution cannot exceed the decree which it enforces; and that the owner of the property mortgaged, which is directed to be sold, can only be bound when he has had notice of the proceedings of its sale, if he acquired his interest previous to their institution, it is too obvious to require either argument or authority. It is a rule old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court; that is, without being duly cited to answer respecting them, and being heard and having opportunity of being heard thereon."

If anything was determined in the foreclosure suit, it was in favor of appellant. Whatever may be subversive of his alleged rights must be settled by the proper action against him, or, if he so desire, he may commence an action to determine them. See, also, *Enos v. Cook*, 65 Cal. 175, 3 Pac. 632; *Skinner v. Beatty*, 16 Cal. 157; *Burton v. Lies*, 21 Cal. 88; *Frisbie v. Fogarty*, 34 Cal. 11; *Daniels v. Henderson*, 49 Cal. 247; *Asher v. Cox*, 2 Ariz. 71, 11 Pac. 44.

I therefore dissent from the majority of the court.

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[Civil No. 251. Filed March 19, 1889.]

[21 Pac. 888.]

THE TERRITORY OF ARIZONA, Plaintiff and Appellee, v. DELINQUENT TAX LIST OF APACHE COUNTY FOR 1887, Defendants and Appellants. Appeal of the Atlantic and Pacific Railroad Company.

1. TAXATION—DELINQUENT TAXES—JURISDICTION—SPECIAL TERM—REV. STATS. ARIZ. 1887, PARS. 2685, 628, CITED AND CONSTRUED.—The Revenue Act (par. 2685, *supra*), provides that the tax-collector must publish, with the delinquent list, a notice that he will apply to the



district court "at the next ensuing term thereof" for judgment and order of sale of the property described, and also give notice "that on the Monday next succeeding the day fixed by law for the commencement of such term" such property will be sold. Regular terms of the district court commence on the first Monday in July of each year. Paragraph 628, *supra*, provides that special terms of the district court may be held "whenever in the judgment of the presiding judge of said court public justice demands it," and that notice be given by the clerk upon the order of the judge by publication. The proceeding contemplated by the revenue law, being special, should be strictly construed and every material provision of the statute complied with. The term "fixed by law" must be the regular term of court as fixed by statute. Special terms cannot embrace special proceedings requiring fixedness of time.

2. COURTS—SPECIAL TERMS—RECORD.—The record must affirmatively show the authority by which a special term is held.

WRIGHT, C. J., dissents.

On rehearing.

1. REHEARING—PURPOSE OF.—The purpose of a rehearing is not to open the whole case, but to afford an opportunity for the court to correct any misapprehension of the record, or any oversight or omission inadvertently made. *Arizona Prince Copper Co. v. Copper Queen Copper Co.*, 2 Ariz. 169, 11 Pac. 396, cited.
2. COURTS—REGULARITY OF PROCEEDINGS—PRESUMPTIONS—WANT OF RECORD—SPECIAL TERM—CONVENING ORDER.—While what is recited in the record of a court of general jurisdiction as having been done is presumed to be done, this presumption will not put into the record what is not there. The record of a special term must show that it met according to law and upon due notice.
3. TAXATION—COLLECTION BY SUIT—SPECIAL PROCEEDING IN REM—JURISDICTION OF COURT SPECIAL.—The collection of taxes is a special proceeding *in rem*. When this special power is conferred on courts they are treated, in the exercise of it, as courts of special jurisdiction.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Apache. James H. Wright, Judge. Reversed.

The facts are stated in the opinion.

William C. Hazeldine, Solicitor for Appellant. J. A. Williamson, and E. M. Sanford of Counsel.

As appears on the face of the complaint, it was filed at "the special April term, 1888." The judgment and proceedings

and all the acts sought to be reviewed by this appeal were also had at a special term.

The notice of the time and place of sale of property mentioned in the delinquent list (including that of defendant) fixes the date of application to District Court, for a judgment against the same, upon the third Monday in April, 1888, and announces that the sale of said property will take place on the Monday succeeding said third Monday in April, 1888.

The regular term of the district court, as fixed by law, to be held in the county of Apache, commences on the first Monday of July of each year. Rev. Stats. Arizona, p. 162, par. 626.

From this it appears that only one term of court is provided for by law to be held in the county of Apache each year, and that the term at which the judgment complained of was attempted to be rendered, commenced on the third Monday in April, 1888, the same being the sixteenth day of April.

For provisions as to holding special terms of court, see Rev. Stats. Arizona, p. 162, par. 628.

For provisions as to requirements of the delinquent list and when it must be published, see Rev. Stats. Arizona, p. 479, par. 2685.

A judgment, to be in accordance with the statute, must be rendered at a term fixed by law, and the collector's notice appended to the delinquent list must distinctly state the fact that he will apply for judgment at the next ensuing term after the publication of such delinquent list and for an order to sell the property therein specified on the Monday next succeeding the day *fixed by law* for the commencement of *such term*; that is to say, the law specifically declares that special jurisdiction is given to district courts to pass upon the sale of delinquent property for taxes at terms fixed by law. The question to be passed upon herein is, is a special term of court a term fixed by law? If this proposition be answered in the negative, the entire proceedings sought to be had in this case fall to the ground.

The statute providing for the sale of property for taxes being in derogation of the common law, and in effect providing for the confiscation of property for the non-payment of taxes, must be strictly construed, and every act and thing

required to be done, must be done at the time and in the manner prescribed and in strict accordance with the provisions of the act.

The supreme court of the United States has established the rule, which is imperative so far as the territories are concerned, in the opinion delivered by Mr. Chief Justice Marshall in the case of *Thatcher v. Powell*, as follows: "In summary proceedings where a court exercises extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction, ought to appear in order to show that its proceedings are *coram judice*." *Thatcher v. Powell*, 6 Wheat. 119.

The jurisdiction of the district court to take cognizance of these tax cases is dependent entirely upon the publication of the advertisement heretofore mentioned. Rev. Stats. Arizona, 1887, *supra*.

As illustrating the strict and technical compliance with the statute required in tax sales, attention is called to the rule in Missouri, where the law requires the sale to be made before the courthouse door of the county. In several instances the sales were made inside the courthouse, and were held void. The court says: "The law has prescribed the place of sale, and that is the only proper place, *and it is so because the law has said so*, and there can be no reasoning about it." *Rubey v. Huntsman*, 32 Mo. 501.

There is no authority under the common law for a court to order the sale of property for taxes due thereon. This is a special proceeding deriving its validity and authority from statutory law. The jurisdiction conferred is special and limited. It must appear from the recitals of the record itself that the facts existed which authorized the court to act. In this instance the record shows these acts were done at a special term, and the law prescribes that the proceedings must be had at a term fixed by law. Cooley on Taxation, p. 358; *Thatcher v. Powell*, 6 Wheat. 119; *Dakin v. Hudson*, 6 Cow. 221; *Deming v. Corwin*, 11 Wend. 647; *Selden v. Wright*, 5 N. Y. 497; *Bridge v. Ford*, 4 Mass. 641; *Platt v. Stewart*, 10 Mich. 260.

This brings us to the question as to the meaning of the

phrases used in the act, "at the next ensuing term" and "the Monday next succeeding *the day fixed by law* for the commencement of such term," and as to whether or not they could be construed as embracing special terms, or terms called by and at the pleasure of the judge, and not held upon dates fixed and determined by legislative enactment.

Terms of court are defined to be those times or seasons of the year which are set apart for the dispatch of business in the superior court of common law. Tidd's Practice, 105. As is said by the supreme court of Pennsylvania, "Civilization and its attendant, commerce, has in more modern times extended the administration of the law by the courts of justice much beyond the limits of merely leisure periods; but still terms, definite and fixed, are prescribed and are absolutely necessary to the successful administration of the judicial duties, so far as the public is concerned; and hence they are with us, fixed by positive law. . . . On this point (speaking of the question raised as to the jurisdiction at an adjourned term) the act of the 5th of April is very explicit. It provides that the terms of the court shall commence on the first Mondays in March, June, September, and December, and continue for four weeks at each term. This is the *term fixed by and known to the law*, and it cannot be supposed that the obligors understood that any different or other time was meant." *Horton v. Miller*, 38 Pa. St. 270; *Butcher v. Brand*, 6 Iowa, 235; *State v. Posey*, 17 La. Ann. 252.

"When the statute speaks of 'terms,' the terms constituted by law are meant, not *special terms* appointed by the court. *Commonwealth v. Sessions of Norfolk*, 5 Mass. 435; *Smith v. Cutler*, 10 Wend. 590, 25 Am. Dec. 580." *Tompkins v. Clackamas Co.*, 11 Or. 364, 4 Pac. 1210. See, also, *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *Garlick v. Dunn*, 42 Ala. 404; *Brown v. Hogel*, 30 Ill. 119; *Marsh v. Chestnut*, 14 Ill. 224; *Spellman v. Curtenius*, 12 Ill. 409.

The rule established by the supreme court of the United States for the government of this and other courts directly subordinate to it as to the construction to be placed upon statutes providing for the sale of property for the non-payment of taxes, is as follows: "In an *ex parte* proceeding, as a sale of land for taxes under a special authority, great

strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be shown to have been complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes to cover any radical defect in his proceeding." *Ronkendorf v. Taylor's Lessee*, 4 Pet. 349.

A term called by a judge or a special term is not in any sense of the word a term fixed by law, or such a term designated by the legislature as that at which proceedings should be had for the purpose of enforcing the collection of delinquent taxes.

Even if it were possible to place such a construction upon the language "a term fixed by law" as to embrace a special term called by the judge, this special term at which the judgment in this case was attempted to be rendered was *coram non judice*, because the record does not show, neither does it appear affirmatively in any manner, that this special term was called in manner and form as required by law.

The section authorizing special terms provides that the same may be held upon notice for that purpose to be published in a newspaper, such notice to be given by the clerk upon the order of the judge. Rev. Stats., sec. 628, *supra*.

This being a special term, the power to convene and the authority under which the same was opened must appear affirmatively of record, as no presumptions are indulged in favor of a special term, thus reversing the usual rule as to courts of general jurisdiction. *Clelland v. People*, 4 Colo. 244; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

John A. Rush, Attorney-General, and Harris Baldwin and T. W. Johnston, special counsel, for Appellee.

"It is unnecessary that the order calling a special term of the circuit court should be set out in the record. Unless the contrary expressly appears, the presumption is in favor of the regularity of the term." *Teerner v. People*, 81 Ill. 412.

"Where a proceeding appears to have been at a special or general term, the presumption of law is in favor of the regularity of said term and of the jurisdiction of the court. This presumption may be rebutted, it is true, by showing affirmatively that there was no order of the judge or court ap-

pointing the special term, or where the court can see from the public law that the judge was required to be in another place, holding another court." *Cook v. Renick*, 19 Ill. 600.

"It is contended that if the court was legally empowered to hold a special term, it was in this instance done without authority of law, because it does not appear by the record that the judge notified the sheriff of the same, or that the sheriff put up at each of the precincts in the county at least three weeks' notice of the time when the special term was to commence. As decided by this court time and again, we must necessarily presume that the officers of the court performed their duty in such particular, unless the contrary appears." *Harriman v. The State*, 2 G. Greene, 277.

"The statute providing for it is merely directory, and such notice is not considered an essential prerequisite to confer jurisdiction." *Harriman v. The State*, 2 G. Greene, 277.

See, also, *Wright v. Lee*, 2 G. Greene, 94; *Reynolds v. Stansbury*, 20 Ohio, 353; *Bosworth v. Vanderwalker*, 53 N. Y. 599; *Ferguson v. Crawford*, 86 N. Y. 611.

PORTER, J.—This is one of the cases wherein the Atlantic & Pacific Railroad resists the payment of the taxes for the year 1887 in the counties of Mojave, Yavapai, and Apache. There are questions common to each of those counties, but an independent one applies alone to the county of Apache, which question arises as to the jurisdiction of the court in which judgment was obtained against the railroad. A special appearance was made to the jurisdiction, and the contention made that, it being a special term of the court, there was no authority to try the tax cases. The complaint shows its being filed at the special April term, 1888. The judgment was had at the special term. The notice of the time and place of sale of property in the delinquent list fixes the date of the application to the district court for a judgment against the same upon the third Monday in April, A. D. 1888, and that the sale will take place on the Monday succeeding said third Monday in April, A. D. 1888. The regular term of the district court to be held in the county of Apache commences on the first Monday in July of each year. Paragraph 628, Revised Statutes, pro-

vides that "special terms of the district courts may be held in any county of this territory for the trial of civil and criminal causes, and the transaction of civil and criminal business, generally, or of either, whenever in the judgment of the presiding judge of said court public justice demands it. Such special terms shall be held upon notice for that purpose, to be published in some newspaper printed in the county where the court is to be held, if there be a newspaper published in said county, and if no paper is published in said county, then by notice published in some newspaper published in the district; said notice to be given by the clerk upon the order of the judge." Chapter 7 of the Revenue Law provides for the publication of the delinquent list, when the same must be published, and what it must contain, and it then prescribes the notice to be given in the following language: "The tax collector must append and publish, with the delinquent list, a notice that he will apply to the district court held in and for said county, at the next ensuing term thereof, for judgment against the lands and real estate and personal property described in said list, for said taxes, costs, and interest, and for an order to sell the same for the satisfaction thereof; and shall also give notice that on the Monday next succeeding the day fixed by law for the commencement of such term of the district court all the lands and real estate and personal property, for the sale of which an order shall be made, will be exposed to public sale at the building where the district court is held in said county, for the amount of taxes, interest, and costs due thereon; and the advertisement published according to the provisions of this section, shall be deemed to be sufficient notice," etc. See Rev. Stats. Ariz., p. 479, par. 2685. On publication and advertisement, and the filing of a complaint, the district court acquires jurisdiction over the property described in the delinquent list. But at what term of the court does this jurisdiction obtain? This is a special proceeding, and should be strictly construed. The case of *Brown v. Hogle*, 30 Ill. 119, cited by counsel, was where the collector was required to apply for judgment at the June term. He applied at July term. The court says: "The term is fixed by law, and the design is that all persons owning

lands in the county, looking to the law for their rights, may know, certainly when the application will be made, and make such defense as the law entitles them to make, and show cause, if they can, why judgment should not be rendered against their lands. If this rested in the discretion of the collector, and the people interested are to derive their knowledge of the term at which the application will be made solely from the collector's notice, much embarrassment and loss might occur, as those notices are not so widely diffused as the law itself." And further on, quoting with approval a former decision of the same court, the learned judge says: "It is a sound and inflexible rule of the law that when special proceedings are authorized by statute, by which the estate of one man may be divested and transferred to another, every material provision of the statute must be complied with. The owner has a right to insist upon a strict performance of all the material requirements, especially of these designed for his security, and the non-observance of which may operate to his prejudice. See *Brown v. Hogle*, 30 Ill. 119. See, also, *Marsh v. Chestnut*, 14 Ill. 224; *Spellman v. Curtenius*, 12 Ill. 409.

We must conclude that the term "fixed by law" must be the regular term of court as fixed by statute. Special terms are allowed to be held for the trial of civil and criminal causes, and the transaction of civil and criminal business generally. This is certainly not to embrace special proceedings requiring a fixedness of time. The time of sale is on Monday next succeeding the day fixed by law for the commencement of such term. All the tax-payers are presumed to know their regular terms of courts. The holdings of special terms are in the discretion of the judge. A tax-payer, knowing such time, rests easily, believing at the proper time he can come and make his defense. He may temporarily leave the territory, and, while resting in fancied security, an order is made for a special term of court, and he divested of his property without a hearing. It is not thus in other actions, for there the resident litigant has to be personally served with process, and, besides publication in non-resident cases, the summons and complaint have to be mailed to the defendant.



Conceding, though, that "the ensuing term" meant the special April term of this district court, the record must affirmatively show the authority by which the special term was to be held; it being a special proceeding, and therefore no intendment being in its favor. The record does not disclose that the notice to be given by the clerk upon the order of the judge was so given. It commences: "April 16, 1888, present, presiding," etc. The supreme court of Colorado announces that if the judge of that district did, by order, fix a term of the district court to be begun and held for the county of Fremont on the sixteenth day of November, 1876, this fact should affirmatively appear by the record." *Clelland v. People*, 4 Colo. 244. And also in *Dunn v. State*, 2 Ark. 254, 35 Am. Dec. 54, it says: "And the most important circumstance upon which the right of power of the judge to order a special term of the circuit court is made to depend cannot judicially appear otherwise than by being made of record, it being a matter altogether *in pais*." . . . The judgment for the plaintiff in the county of Apache, as to the defendant the Atlantic & Pacific Railroad Company, is reversed.

Barnes, J., concurs.

WRIGHT, C. J., dissenting.—I deeply regret that the majority of the court have felt constrained to reverse this case for the reasons assigned. The magnitude of the interests and the questions involved, both to the people and defendant, the Atlantic & Pacific Railroad Company, render the final determination of those interests and questions a matter of grave public concern. If the railroad is not liable to taxation, it should be no longer harassed with suits to enforce the collection of taxes from it; if it is liable, the people are entitled to the revenue. In either case, the public interests and justice require that the matter should be speedily adjudicated. We do not mean to intimate, however, that if the judgment was erroneous it should not have been reversed, but we do contend most strenuously that neither of the reasons assigned in the opinion of reversal is tenable.

The first position taken is that the district court of Apache County had no power or jurisdiction to render a

judgment in the tax suit at the special April term, 1888, and could have only rendered the judgment at the regular July term of that year. We deny this proposition, and hold that said district court had plenary power, even if it possessed none other than that conferred by our statute, to render such judgment at any other term provided for by law; the sole and only prerequisites being that it be a term provided for by law, and that it be the next ensuing term after the due perfection of the statutory notice or summons. It cannot matter that such term be a general or special term. The notice required is the same at each, and the power and jurisdiction of the court is as full and complete at one term as at the other. If this be not so, the statute itself is meaningless, and its language a delusion. It says: "Special terms of the district courts may be held in any county of this territory for the trial of civil and criminal causes, and the transaction of civil and criminal business, generally or of either, whenever in the judgment of the presiding judge of said court public justice demands it." See Rev. Stats. Ariz. 1887, par. 628. Well, in the judgment of the presiding judge of the district court of Apache County, public justice demanded that the special April term, 1888, thereof be held. Accordingly, in compliance with the statute, the judge issued the order calling said term, and requiring the clerk of said court to publish due notice thereof in the St. Johns Herald, a newspaper published in Apache County. It is not denied that all this was done, and that said order was by the clerk filed with the records of said court; but it is claimed that the order and notice are not set out in the record of this case. Now, we do not know what law-maker drew this statute; but, after mature deliberation, we have been wholly unable to conceive of language, conferring upon the court power and jurisdiction more fully, accurately, and completely, to render any sort of judgment or transact any sort of business, either civil or criminal. But, while this is incontrovertible, the majority of the court in their opinion say: "This is certainly not to embrace special proceedings requiring fixedness of time. The time of sale is on Monday next succeeding the day fixed by law for the commencement of such term." What term?

What is the day fixed by law for the commencement of such term? Where is the fixedness of time? The opinion does not tell us. The only "fixedness" is that it must be the first term following the publication of the notice. The opinion makes it in this case the second term thereafter. Do my learned associates mean to say that the statute prescribes any definite, fixed term *eo nomine*? If the legislature had named any particular special or general term at which alone tax-suits should be tried and tax-judgments rendered, that would perhaps be a limitation upon the power and jurisdiction of the court. But it has not done so. There is absolutely nothing in the revenue act "requiring a fixedness of time" for the commencement of tax-suits in the district court, or a definite term of court, either general or special, at which alone tax judgments shall be rendered. The nearest approach to "a fixedness of time" is where the tax collector is required to apply for the tax judgments at the next ensuing term after the due completion of the statutory notice. The word "ensuing" is synonymous with the word "following"; both mean "coming after." Now, it is not and cannot be denied that the court had power to call the special April term, 1888.

It is not and cannot be denied that that was the next ensuing term after the completion of the notice. It was the first term following or coming after said notice. Did the legislature mean what it said when, by specific enactment, it required the tax collector to apply for the tax judgment at the term next ensuing or following, or coming after the completion of the statutory notice or summons to delinquent tax-payers? If it had meant the next ensuing general term only, would it not have used the one single word "general"? Or, as it is more probable, as it had provided only one general term for Apache County, viz., the term beginning on the first Monday in July, would it not have said that such judgment should be applied for at the general July term? If this had been the case, and the judgment had been rendered at the special April term, it would have been clearly irregular. This was the case with the principal authority relied upon by the majority of the court to sustain their opinion. See *Brown v. Hogle*, 30 Ill. 119. There the collec-

tor was required by statute to apply for judgment at the June term. Of course, that did not mean the July term, or any other term, general or special. It meant the June term; no more, no less. And when he applied at the July term he was wrong. But our statutes do not say the July term, or any other term, special or general, except the particular term next ensuing, following, or coming after the completion of the publication of the notice; and that term in this case was the special April term, 1888. Nothing can be clearer and more certain than this. No sort of ambiguity can be detected here. It is plain, unmistakable. The conclusion is irresistible, then, that the court had power, under the statute, to call the special April term, 1888, and, if it did call it, according to the provisions thereof, it had power and jurisdiction, even under the same statute, to render the tax judgment. The tax-suit was either a civil or criminal suit, or it was civil or criminal business. It is idle to contend otherwise. Well, if it was either, the statute authorizing special terms clothed the court, even if, as a court of general jurisdiction, it had no inherent power, with complete and plenary power and jurisdiction to act. Does not the power to try civil and criminal causes, and to transact civil and criminal business, generally, necessarily include the power to transact civil or criminal business specially? Does not the greater include the less? If the opinion herein is correct in this regard, we have in this territory this unprecedented judicial condition, viz.: That at a special term of the district [court], called as provided for by the statute, a man may be indicted for murder, tried, convicted, and sentenced to be hanged, and the hanging would be legal, but a judgment cannot be had against him for a two-dollar tax. Pretext can generally be found, if sought with diligence; and the history of tax litigation reveals that delinquent tax-payers have generally been as successful in this direction as any other class of litigants. More especially is this true with reference to corporations that have sought to avoid taxation. Hence nothing is truer of modern jurisprudence than that the great bulk of adjudication is towards stricter construction, where exemption from taxation is sought, and more liberal construction in favor of revenue laws.

And it is here to be observed that the three authorities relied upon in the opinion, viz., the decisions in 12, 14, and 30 Illinois, have been virtually abrogated by the Illinois revenue laws of 1872-73; and the supreme court of Illinois in 1875-76, and in fact down to the present time, in construing this revenue law, and proceedings under it, has distinctly recognized this fact. In the case of *Thatcher v. People*, 79 Ill. 597, the supreme court of that great state says: "Hence this amendment to our revenue law; and by it nearly, if not all, our previous decisions have been abrogated as rules for the determination of cases arising after the adoption of the amendment."

Now, in 1887, the territory of Arizona, through its legislature, adopted this Illinois revenue law of 1872-73, almost *verbatim et literatim*, with the construction put upon it by the supreme court of Illinois in *Thatcher v. People*, and other cases passed upon prior to 1887. 30 Ill. 119, has already been noticed; but it is to be further observed that *March v. Chestnut*, 14 Ill. 224, and *Spellman v. Curtenius*, 12 Ill. 409, the other two cases relied on, only uphold the old, dogmatic, common-law rule that requires technical accuracy in the form of tax assessments. Not one word is said in either case about the power or jurisdiction of the court. And we have just seen that by our revenue law, and its prototype, the Illinois revenue law of 1872-73, those common-law rules have either been abrogated entirely or greatly modified. How is it, then, that the majority of the court rely solely on these authorities to sustain their opinion on this branch of the case? The language of the opinion on this point, after quoting approvingly these authorities, is: "We must conclude that the term fixed by law must mean the regular term as fixed by the statute." Here, again, we most respectfully dissent, and hold that a special term of court, called according to the provisions of the statute, is as much a term "fixed by law" as any regular or general term. The mode of fixing by law the term is different; that is all. In the one case the legislature fixed the term in the statute; in the other, by the presiding judge, the term was fixed by law, i. e., by authority and according to the provisions of the statute. A term fixed by law means a term determined upon

by law. So it is fixed and definite, it is wholly immaterial whether it be a term fixed by the statute, or a term fixed by the judge by authority of the statute. In either case, or in both, it is "a term fixed by law." Is it not, therefore, a strained construction to say, "the term fixed by law" must mean, alone, the regular term of court fixed by the statute? The converse of a proposition is necessarily true, and therefore, if the phrase "fixed by law" means only regular terms fixed by the statute, special terms, although fixed by the judge by authority of the statute, are not terms fixed by law. And if they are not terms fixed by law they are not legal terms, and can therefore have no legal existence.

But says the opinion: "All the tax-payers are presumed to know the regular terms of court." Of course, they are supposed to get this knowledge from the statute. Is the statute fixing the regular terms of court the only portion of that repository of law that delinquent tax-payers are presumed to know? Are they not equally presumed to know the other provisions of the statute, especially those providing for special terms? But again says the opinion: "Special terms are held in the discretion of the judge." Well, has the delinquent tax-payer any cause of complaint? He is presumed to know the law. He knows that that law provides that, whenever in the judgment of the presiding judge public justice demands it, special terms of the district court may be held for the trial of any sort of cases and the transaction of any sort of business. He knows his taxes are overdue; that public justice demands that he should pay his taxes as well as the rest of his fellow citizens. He knows that public justice demands that, if he is to be shielded with the protection of the government, he should be burdened with and should pay his share of taxes to support the government. He knows, or ought to know, that protection and taxation are correlative rights. Has not the revenue law been just to him? Does it not provide that if the tax-payer is dissatisfied with the taxes assessed against him he may appeal to the board of equalization? Was not that privilege allowed and embraced in the case at bar? If the court was speaking of tax-payers before they became delinquent, it seems to us there would be more force in the opinion. It

must be borne in mind, however, that delinquent tax-payers alone are here spoken of,—those who are endeavoring to thwart the purposes of the revenue law; a purpose which that law, in its broad, comprehensive, just, and enlightened provisions, did not intend should be accomplished by mere technicalities. Finally, on this branch of the case, the court say: “He [meaning the delinquent tax-payer] may temporarily leave the territory, and while resting in fancied security,” etc. What right has he to rest in fancied security? He is defaulter in the payment of his taxes, and does he not know it? In that sense, if he leave the territory temporarily is he not temporarily a refugee from justice? Would it not be an honest and reasonable apprehension on his part to suppose that that government, which had protected him and his property, and to which his taxes had long since been due, would use every legitimate means at its disposal, after those taxes became due and were not paid, to compel him to do that which he, as a good citizen, ought to have done long ago? Is not every day that he is indulged, after his taxes have become delinquent, a matter *ex gratia* the government, for which he ought to be thankful, instead of complaining and “resting in fancied security”? If a tax-suit is different from other actions, it is just as widely different at a regular as at a special term of court.

Our conclusion, therefore, is that as the court had unquestionable authority to hold the special April term, 1888, of the Apache County district court; that, as at said term it had plenary power and jurisdiction, not only as a court of general jurisdiction, but from the broad and unlimited grant of power in the statute authorizing such terms to render any sort of judgment, civil or criminal, including tax judgments, or transact any sort of business, civil or criminal, including tax business; and that as said special April term, 1888, was the term next ensuing, following, or coming after the due completion of the statutory notice to delinquent tax-payers, it alone was the legal and proper term at which the tax-collector should have applied for his tax judgment; and that the proceedings of the court in the tax suit were *coram judice*. The law being peremptory in requiring the tax collector to apply for judgment at the first term coming after

the completion of the notice, he could not, without some good excuse, legally apply at the second term thereafter.

In the next place, the court, in their opinion say: "Conceding, though, that the next ensuing term meant the special April term of the district court, the record must affirmatively show the authority by which the special term was held." We most respectfully, but solemnly, deny this proposition also, and hold that the law conclusively presumes the special term to have been properly held till the contrary be made to appear. The district court of Apache was and is as much a court of general jurisdiction at a special term as at a general term. There are no words of limitation as to its jurisdiction at a special term, contained in any law or statute; nor is its power limited in any degree differently at a special term from what it is at a general term; and therefore the same presumptions as to jurisdiction and the regularity of its proceedings at a special term must be indulged as at a regular term. In either case, its proceedings are to be according to the course of the common law, modified only by statutory limitation. It is everywhere and always a court of general jurisdiction. Of course, it would be competent for a defendant to show affirmatively that the court had not acquired jurisdiction of his person, for instance; but the *onus probandi* would be on him, and until he made the requisite proof the presumption would hold that the court had jurisdiction. Let it be observed that it would be as competent for him to make such affirmative proof at a regular term as at a special term, and *vice versa*. It is a misapprehension to suppose that, because the term of the court is a special term, its proceedings are necessarily special. Some of its proceedings might be special; so might they be at a general term. If tax suits are special proceedings, they are not less so because had at a general term. The truth is the law contemplates that court proceedings at a special term shall be as general as at a regular term; for special terms are held for the trial of civil and criminal causes, and for the transaction of civil and criminal business generally or either. This language would certainly compass all the purposes for which regular terms are held. The legislative will is thus clearly revealed, that the proceedings of a special



term shall be as general as at a regular term, and that the court should be as much a court of general jurisdiction at the one term as at the other. The law then presumes that the district court had jurisdiction, and that its proceedings were legal and regular at the special April term, 1888, in Apache County, until the contrary is made to affirmatively appear. But says the opinion: "The record does not disclose that the notice to be given by the clerk upon the order of the judge was so given." The record does not disclose this fact, and it is perfectly certain that it did not have to disclose it. Nor was it necessary that the order of the judge calling the special term, should be set out in the record.

The district court of Apache County at its special April term, 1888, being a court of general jurisdiction, the presumption of law is in favor of the regularity of its said term until the contrary is made to appear. If the opinion is correct in this regard, we have this singular condition of affairs: That if a hundred civil and criminal cases are to be tried at a special term of the district court, each trial will be void, unless the record of each case contain a recorded copy of the order of the judge calling the special term, and also a recorded copy of the notice thereof, published by the clerk upon the order of said judge in some newspaper in the county where the term is to be held. This is necessarily so, because the court speaks of the "record." It means the record of the tax suit, no other record being before it, and that record must affirmatively show, etc.; and therefore what it means to say is that the record of this particular case, as well as all others tried at that term, must affirmatively show that the said order and notice were given, and the only way that these facts can be made to judicially appear, is to record the said notice and order in each case. The record of each case stands alone, so that a hundred cases having been tried, the order and notice would have to be recorded a hundred different times. Can this be law? Can this be essential to the jurisdiction of the court? Now, the statute providing for special terms does not require that either the order or notice be filed or recorded by the clerk. It does require that the order be made and the notice given.

Even these requirements, however, are only directory. It is not denied that this was done in this case. At all events, until the contrary be made to affirmatively appear, the law by intendment says it was done. Indeed, counsel for defendant in their argument admitted that the order of the judge calling the term was made and filed by the clerk, and that the clerk gave the notice. But the court say the notice should affirmatively appear; that is, that it should have been recorded by the clerk with the record of the case. That is not law. The Iowa statute of 1839, authorizing territorial district judges to hold special terms of court, was very similar to ours. The only difference was that there the judge was required to direct the sheriff instead of the clerk to give the notice. In the case of *Harriman v. State*, 2 G. Greene, 270, the record was silent as to whether the notice had been given or not, precisely as in the case at bar. Mr. Justice Greene, in delivering the opinion of the supreme court of Iowa in this case, said: "Another objection was urged to this special term, to which we will merely advert. It is contended that if the court was legally empowered to hold a special term it was in this instance done without authority of law, because it does not appear by the record that the judge notified the sheriff of the same, or that the sheriff put up at each of the precincts in the county at least three weeks' notice of the time when the special term was to commence. As decided by this court time and again, we must necessarily presume that the officers of the court performed their duty in such particular, unless the contrary appears. An averment of such facts in a record is not necessary. The record being silent, the fact that legal notice was given is established by intendment."

Does not this exactly cover the case at bar? But even if it were a fact that the clerk gave no notice of the special April term, 1888, at all, the above authority settles the law that the proceedings of the court would not have been thereby invalidated. It says further: "The proceedings of the court, without such notice were not void. The statute providing for it is merely directory, and such notice is not considered an essential prerequisite to confer jurisdiction." See *Friar v. State*, 3 How. (Miss.) 422.

Again, in the case of *Wright v. Marsh*, 2 G. Greene, on page 104, this same high authority, after clearly demonstrating that the territorial district courts of Iowa were in the highest sense courts of general jurisdiction, says: "The term 'inferior courts,' in a strict and technical sense, is only applicable to courts of a limited and special jurisdiction, in which the proceedings are not according to the course of the common law, but defined by statutory regulations. It must be obvious that our territorial district courts cannot be included under that term. They were endowed with all the general powers and universal attributes of common-law jurisdiction.

"But it is contended that if the district court, which rendered the decree, did possess general jurisdiction, it acted in the partition proceedings under special authority conferred by the statute, and was consequently *quoad hoc* an inferior or limited court. The requirements of the statute, so far as they are especially substituted for equity and common-law proceeding, are paramount, but, beyond such special substitution, law and chancery interpose with unabated and general concurrent authority. Hence we conclude that, even in cases in partition under our statute, the district court cannot be considered *quoad hoc* as inferior or limited. The doctrine will not be questioned that the general jurisdiction of a court cannot be taken away, unless by express words of exclusion. As the record comes from a court of general jurisdiction, it did not become necessary to incorporate into it a copy of the notice or the proof of publication. Without these the record would have been sufficiently authentic and conclusive. The authority of the court over the subject-matter and over the parties and the correctness of the proceedings would have been favored by all the force of legal presumption."

But that great supreme court which gave such lucid and conclusive construction to the Arizona revenue law, while yet it was the revenue law of Illinois, has, it seems to us, put this question beyond the line of discussion. In the case of *Teerney v. People*, 81 Ill. 411, Mr. Justice Sheldon says: "It is unnecessary that the order calling a special term of the circuit court should be set out in the record.

Unless the contrary expressly appears, the presumption of law is in favor of the regularity of the term." And in the case of *Cook v. Renick*, 19 Ill. 598, the first error assigned by appellant was as follows: "That the term of the court, at and during which final judgment was rendered in said cause, does not appear by the record to have been held at the time, convened in the manner, and notice thereof given, as required by law." In delivering the unanimous opinion of the court in that case, Chief Justice Caton said: "Where a proceeding appears to have been at a general or special term, the presumption of law is in favor of the regularity of said term, and of the jurisdiction of the court. This presumption may be rebutted, it is true, by showing affirmatively that there was no order of the judge or court appointing the special term, or where the court can see from the public law that the judge was required to be in another place, holding another court. Such were the cases of *Goodsell v. Boynton*, 1 Scam. 555, and *Archer v. Ross*, 2 Scam. 303."

#### ON REHEARING.

BARNES, J.—The petition for a rehearing in this case must be denied. The questions presented thereby were fully argued by counsel and considered by the court in the former hearing. It evidently seeks to discuss with the court rather the reasons for the conclusion than the decision itself. The purpose of a rehearing is not to give an opportunity to reopen the whole case for a new discussion. It is simply an opportunity, out of abundant caution, for the court to correct any misapprehension of the record, or any oversight or omission that may have been inadvertently made. *Copper Co. v. Copper Co.*, 2 Ariz. 169, 11 Pac. 396; *Sauls v. Freeman*, 24 Fla. 225, 4 South. 577; *Hannan v. Grizzard*, 99 N. C. 161, 6 S. E. 93; *Elliott v. Cale*, 113 Ind. 383, 14 N. E. 708, 16 N. E. 390; *Shreveport v. Holmes*, 125 U. S. 694, 8 Sup. Ct. Rep. 1389. However, after a careful consideration of the case, we must adhere to our decision rendered. Our attention is called to the view expressed that the record must show that the special term was called according to law, and it is urged that, as the proceedings of courts of general jurisdiction are presumed to be regular, we must presume that this proceed-

ing was so. There seems to be a misapprehension as to just what is meant here. When a court of general jurisdiction enters an order or judgment, it is a record against which there may be "neither averment nor proof." It is verity. What is recited as having been done is presumed to be done, and upon competent evidence. But this presumption will not put into the record what is not there,—will not make an order, where there is none. The convening order of any term of court is a part of the record in such case, considered during that term. It is the beginning, the basis, the authentication, of all that follows. It recites that the court met according to law on the day named, and that there were present the judge, the clerk, the marshal, the sheriff, etc.; and then the record recites that on a day named, said day being one of the days of said term in a certain cause named, the following proceedings were had and entered of record. If it be a special term, the convening order would say, in substance, that on a day named the court met pursuant to an order of the judge, and after due notice, according to law, etc. Such a record imparts verity, and it will be presumed that the requirements of the statutes as to the order and notice have been complied with. This is what we mean when we say that the record must somewhere show that the special term met according to law, and upon due notice. In this record there is no convening order. Nothing to show, by way of recital in the record, whether the proceedings were in regular or special term. If in special term, whether it was duly entered and upon due notice. Nothing to show that the court was in session at all. Presumptions will not supply this; where it appears that proceedings of a court were had it will be presumed that they are regular. *Lawrence v. Fast*, 20 Ill. 342; *Dukes v. Rowley*, 24 Ill. 220. These are maxims so old and well-established as to have hardly been questioned.

Again, it is urged that the collection of taxes is not a "special proceeding." It is idle to stumble over words. It is a proceeding *in rem*. It is the creature of statute. Service is made in a manner provided for by law, and no personal service is required. Each step in the cause is pointed out. What evidence is required, also. It is summary in its

form and mode of procedure. In this sense it is special, and must conform to law. The statute says that the judgment for taxes shall be rendered at the next term "fixed by law" after notice, etc. The law fixes the time of a term of court in Apache County on the first Monday of July. This is the only term fixed by law. It is a term whose time of session is fixed by the statute itself, and of which every person is charged with notice. Where a special term of court is provided for by law, its time of session is fixed by order of the judge, not by the law. Everybody would know when to appear and defend at the term fixed by law, and he might rest secure until then to make his defense. In *Thatcher v. Powell*, 6 Wheat. 119, Chief Justice Marshall says: "In summary proceedings, where a court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*." Blackwell on Tax Titles (section 356), commenting on this decision, adds: "And it makes no difference whether this power is conferred upon a special tribunal created for the sole and only purpose of trying tax causes, or whether the power is superadded to a court of general common-law and chancery jurisdiction. When this special power is conferred upon such courts, to be exercised in a summary way, they are treated, in the exercise of this particular power, as courts of special jurisdiction." See *Young v. Lorain*, 11 Ill. 636, 52 Am. Dec. 463; *Dentler v. State*, 4 Blackf. 258, 18 Am. Dec. 159; *Smith v. State*, 5 Blackf. 65; *Williams v. State*, 6 Blackf. 36; *Williamson v. Berry*, 8 How. 540; *Glass v. Betsey*, 3 Dall. 7; *Rose v. Himely*, 4 Cranch, 241; *Elliott v. Peirsol*, 1 Pet. 328; *Wilcox v. Jackson*, 13 Pet. 499; *Shriver v. Lynn*, 2 How. 430; 2 Am. Lead. Cas., 733 et seq.

Porter, J., concurs.

[Criminal No. 41. Filed March 20, 1889.]

[21 Pac. 152.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.  
GEORGE W. KAY, Defendant and Appellant.**

1. **APPEAL AND ERROR—CONFLICTING EVIDENCE—VERDICT OF JURY.**—Where there is any conflicting evidence, although it may greatly preponderate against the verdict of a jury, appellate courts will not interfere.
2. **SAME—RECORD—BILL OF EXCEPTIONS—REPORTER'S NOTES—ERRORS OF LAW REVIEWED.**—In absence of bill of exceptions or statement of facts, this court will not review the evidence. What purports to be the reporter's notes, without even his affidavit annexed, is insufficient, and was not intended as a substitute for a bill of exceptions or a statement of facts. Manifest errors of law should be corrected, even without a bill or statement.
3. **CRIMINAL LAW—PROVINCE OF JURY—JUDGES OF FACTS.**—It is the exclusive province of the jury, aided by the court only as to questions of law, to say what fact or facts have been proven or not.
4. **SAME—INSTRUCTIONS—ASSUMPTION OF MATERIAL FACTS AS PROVEN.**—Assumption of material facts as proven in an instruction is error.
5. **SAME—SAME—DEGREE OF PROOF—REASONABLE DOUBT.**—An instruction in a murder case to "weigh the testimony of all the witnesses in the case, and from that examination of all the testimony, and all that has been given in the case, and render such a verdict as you believe is fair, just, and right," is error, though a proper instruction as to the degree of proof required as that which satisfies beyond a reasonable doubt was given in another part of the charge.

**APPEAL** from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. J. C. Shields, Judge. Reversed.

The facts are stated in the opinion.

E. W. Wells, and Herndon & Hawkins, for Appellant.

L. F. Eggers, for Respondent.

**WRIGHT, C. J.**—At the June term, 1886, of the district court in and for Yavapai County, in this territory, the defendant, George W. Kay, was tried and convicted of the crime

of murder in the second degree, and sentenced to sixteen years in the territorial prison. The indictment upon which Kay was tried charged him and one Richard Farley with the murder of one Redmond Costello, on the thirteenth day of February, 1886, in said county. Upon motion of defendant a severance was had, and upon the overruling of the motion for a new trial, based on the grounds, mainly, that the verdict was against the evidence, and that the court below committed certain errors of law, the case has been appealed here.

The first contention of the learned counsel for the defendant and appellant is that the verdict of the jury was against the evidence, and therefore the motion for a new trial should have been sustained. This court has repeatedly recognized the rule, which seems to universally obtain, that where there is any conflicting evidence, although it may greatly preponderate against the verdict, appellate courts will not interfere. The virtue of a motion for a new trial, however, is not only to call attention of the court to the evidence, but to confer upon it power to examine and see whether the evidence justified the verdict or not. It would, therefore, be entirely competent for this court to examine the evidence in the case at bar, if it were not for the fact that no bill of exceptions has been preserved, or statement of facts agreed to by the parties, or fixed by the judge. The notes, or what purports to be the notes, of the court reporter, written out from his short-hand notes, without even his affidavit annexed thereto, will not do. This report of the evidence was not intended as a substitute for a bill of exceptions, or an official statement of facts. The one imports absolute verity; the other, at most, is only *prima facie* true. Hence, we cannot here examine the first question raised by the motion for a new trial. See *People v. Padillia*, 42 Cal. 535. Perhaps we would not do so any way, as this decision upon the other points raised will ultimately in a new trial of the case. We entertain no doubt that manifest errors of law should be corrected, even without a bill of exceptions or statement of facts.

The first error of law complained of consists of the following portion of the charge given by the court to the jury: "In this case it is not denied, but is admitted, that the defendant, Kay, at the time named in the indictment, fired the



shot that killed Costello." We think this was error. The record in this case shows that the defendant, upon being formally arraigned, entered a plea of "not guilty," under the force of which nothing was admitted. Whether it had been proven that he fired the fatal shot or not was purely a question of fact for the jury alone to determine. It was not for the court to tell them what facts had been proven; and to tell the jury, under a plea of "not guilty," that it was not denied, but was admitted, that defendant fired the shot that killed deceased, was equivalent to telling them that these facts had been proven. "To questions of law the court responds, and to questions of fact the jury." This is a most salutary rule, and embodies the accumulated wisdom of many ages, acquired in trial courts. It is therefore the exclusive province of the jury, aided by the court only as to questions of law, to say what fact or facts have been proven, and what not. Whenever the court assumes that any facts have been proven in a case, it at once trenches upon the province of a jury, and commits error. As the supreme court of California, in *People v. Strong*, says: "In giving the instruction under consideration, the court assumed that the defendant had made confessions. Even if the evidence had tended to prove that the defendant had in any degree admitted or confessed participation in the crime with which he stood charged, it was for the jury to determine whether such evidence amounted to proof of the fact." See *People v. Strong*, 30 Cal. 158; also *People v. Ah Fung*, 16 Cal. 137; *People v. Carabin*, 14 Cal. 438; and *People v. Williams*, 17 Cal. 146. It is clear to us, therefore, that this portion of the charge to the jury was erroneous. Again, we think the following portion of the charge to the jury was objectionable: "In determining, however, whether the killing was done with that premeditation, deliberation, and formed design which I have spoken of as being necessary for you to find to exist in order to convict of murder of the first degree, you may properly consider the fact that the defendant armed himself after the first difficulty, and that Farley was with him, also armed; the length of time intervening after so arming themselves and returning to the cabin of the deceased; the defendant's manner and language; and the fact that the defendants came back so soon

after the difficulty with Costello," etc. Was it a fact that the defendant armed himself after the first difficulty; that there was a first difficulty; that Farley was with him, also armed; that they returned to the cabin of the deceased; and that defendant came back so soon after the difficulty with Costello? If so, was it not the exclusive province of the jury to ascertain all these facts from the evidence? Was it not error for the court to find them? If a court may find a portion of the facts, in a case where a man is on trial for his life or liberty, may it not find all of them, and thus relieve the jury from the responsible, and often unpleasant, duty of ascertaining them from the evidence? The law estimates human life and liberty at great value, and has thrown around them every shield or protection that the most enlightened jurisprudence and advanced civilization have suggested.

It is again urged that the following concluding part of the charge was erroneous: "Weigh the testimony of all the witnesses in the case, and from that examination of all the testimony, and all that has been given in the case, you render such a verdict as you believe is fair, just, and right." If this had been a civil suit, this instruction would hardly, we think, be obnoxious to criticism; but this was a trial for murder, and while, under the force of this instruction, the jury might have felt authorized to decide from a mere preponderance of the testimony, yet the law is well settled that in this class of cases they may not do so. They must be satisfied beyond a reasonable doubt as to every fact necessary to convict. True, this court holds that a reasonable doubt means a real, substantial doubt, arising from the evidence, and not a mere possibility of defendant's innocence; still, it is required that the jury be satisfied beyond a reasonable doubt. It is not incumbent on the jury, even in a civil suit, to bring in such a verdict as they believe to be fair, just, and right; and, if nothing more is required in a criminal suit, what is the distinction between them? It is evident that the court aimed to be fair and impartial in its charge, for in one portion of it the jury is told that it must be satisfied beyond a reasonable doubt, and beyond a moral certainty; and in another portion it is told that the court had nothing to do with the evidence. And yet can we say that to conclude the charge by telling the

jury to bring in such a verdict as they believe to be fair, just, and right, assuming certain facts, and telling the jury that the defendant had made certain admissions, when his plea of "Not guilty" had been entered, did not have any influence with them? And if so, may not that influence have been prejudicial? Might not the jury believe that their verdict was fair, just, and right, and yet not be satisfied beyond a reasonable doubt. The concluding portions of a charge generally have great force with a jury. They know the court is then giving its ultimate conclusions of law of the case, and are therefore apt to follow any directions contained in these conclusions. The errors here pointed out are such as are liable to occur with the most experienced jurist, in delivering an extemporaneous charge to the jury. We are of the opinion that the judgment should be reversed, and the cause remanded. It is so ordered.

Barnes, J., and Porter, J., concur.

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[Civil No. 252. Filed April 6, 1889.]

[21 Pac. 338:]

ART McDONALD, Plaintiff and Appellee, v. ATLANTIC AND PACIFIC RAILROAD COMPANY, Defendant and Appellant.

1. MALICIOUS PROSECUTION—ESSENTIAL ELEMENTS—WHAT CONSTITUTES PROBABLE CAUSE—QUESTION OF LAW—MALICE—POSSESSION OF GOODS RECENTLY STOLEN.—In an action for malicious prosecution the essential elements are a criminal charge by defendant against plaintiff, made maliciously and without probable cause. Where the facts are admitted, probable cause is a question of law to be determined by the court; if disputed, the court by its charge will say what facts found by the jury will constitute it. Malice is for the jury. The burden is on the plaintiff to prove, by a preponderance of the evidence, both malice and want of probable cause. Where coal recently stolen from defendant was found at plaintiff's house, the possession of such stolen goods amounts to probable cause and justifies a criminal charge. Though the possessor may be innocent, the prosecutor is not bound to seek for an explanation.

WRIGHT, C. J., dissenting.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Apache. James H. Wright, Judge. Reversed.

The facts are stated in the opinion.

William C. Hazeldine, Solicitor, for Appellant. Herndon & Hawkins, of Counsel.

Harris Baldwin, and T. W. Johnston, for Appellee.

BARNES, J.—This is an action for malicious prosecution, brought by one Art McDonald against the Atlantic and Pacific Railroad Company. The cause was tried on November 9, 1887, and a judgment rendered against the defendant, in favor of the plaintiff, for the sum of \$2,300. A motion for a new trial was overruled. The foundation of this action is the alleged illegal arrest of the said Art McDonald on the twenty-fourth day of November, A. D. 1884, at Holbrook, in the county of Apache, on a warrant issued by one F. M. Zuck, a justice of the peace, charging McDonald with being accessory to the larceny of certain coal, which was alleged to have been stolen by one Ed. Wilson from the cars of the Atlantic and Pacific Railroad Company. The testimony showed that Donald McDonald, son of the appellee in this case, purchased for fifty cents from Wilson seven hundred pounds of coal, which Donald McDonald saw Wilson throwing from a car of the said Atlantic and Pacific Railroad Company, and which Donald McDonald caused Wilson to carry to his father's (the appellee's) house, and deposit upon a lot immediately adjoining the one occupied by appellee, and the place where appellee usually stored his coal. Next morning the arrest was made upon the affidavit of one C. F. Colton, as special agent of the Atlantic and Pacific Railroad Company. It further appears from the evidence that for some time past coal had been stolen at Holbrook station. The plaintiff introduced his evidence, and rested; whereupon defendant declined to introduce any evidence whatever, but moved the court to instruct the jury that they must find for the defendant. There was no dispute as to the facts, and no

evidence whatever introduced on the trial of said cause, except that introduced by the plaintiff.

In an action for malicious prosecution, the essential elements upon which it may be based are that there has been made a criminal charge by defendant against the plaintiff; that the charge was made maliciously and without probable cause therefor. If it was malicious, and yet there was probable cause, there can be no recovery. If there was no probable cause, and no malice, there is no action. Whether there was probable cause is a question of law for the court to determine, where the facts are admitted. If the facts are in dispute, the court by its charge should say what facts found by the jury will constitute probable cause. Malice is for the jury. They may find the element of malice from the want of probable cause, but not necessarily. The burden is on the plaintiff to prove, by a preponderance of evidence, both malice and a want of probable cause. These principles have been so long and so deeply settled as to be unquestioned. So long ago as *Farmer v. Darling*, 4 Burr. 1971, Lord Mansfield instructed the jury that the foundation of the action was malice, either express or implied, and the want of probable cause, and all the judges concurred. In *Mitchell v. Jenkins*, 5 Barn. & Adol. 594, Lord Denman said: "I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury." In *Stewart v. Sonneborn*, 98 U. S. 194, Justice Strong, for the court, said: "The existence of a want of probable cause is, as we have seen, essential to every suit for a malicious prosecution. Both that and malice must concur. Malice, it is admitted, may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice." He approves *Sutton v. Johnstone*, 1 Term R. 493: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances allege to show it probable are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law,"—and adds: "This is the doctrine generally adopted." Justice Bradley in his dissenting opinion, based upon the facts of

that case, says: "It hardly needs any reference to authorities to establish the familiar doctrines laid down in the opinion." He says, also: "In short, upon probable cause, every man has a right to bring a charge against another for a public offense. . . . The law gives this right, and protects it in an action brought for malicious prosecution or malicious arrest." Justice Strong, for the court, also holds that the conduct of defendant is to be weighed in view of what appeared to him at the time the charge was made, not in the light of subsequently appearing facts. "Had they [defendants] reasonable cause for their action when they took it? Not what the actual fact was; but what they had reason to believe it was." The cases cited fully bear out this view. This decision by the court of last resort for this court is binding upon us. It is, however, borne out by the overwhelming weight of authority. *Greenwade v. Mills*, 31 Miss. 464; *Whitfield v. Westbrook*, 40 Miss. 311; *Moore v. Northern Pacific R. R. Co.*, 37 Minn. 147, 33 N. W. 334; *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. 491; *McNulty v. Walker*, 64 Miss. 198, 1 South. 55; *Parli v. Reed*, 30 Kan. 534, 2 Pac. 635; *Kelton v. Bevins*, Cooke 90, 5 Am. Dec. 673; *Ulmer v. Leland*, 1 Greenl. 135, 10 Am. Dec. 48; *Bell v. Graham*, 1 Nott & McC., 9 Am. Dec. 690, and note; *Israel v. Brooks*, 23 Ill. 575.

In this case there is no conflict of evidence, and the question presented was this, was there sufficient or probable cause to found the charge against plaintiff? Seven hundred pounds of coal had been stolen from defendant. The *corpus delicti* is not to be doubted. The coal the morning after it was stolen was at the place where plaintiff habitually kept his coal. If he had knowledge that it was there, it was to be inferred that he had knowledge of the larceny. *State v. Manley*, 74 Iowa, 561, 38 N. W. 415. The recent possession of stolen goods clearly amounts to probable cause, and will justify a criminal charge. The possession may be explained consistent with innocence, it is true. To hold that the prosecutor must seek for the explanation would block the enforcement of the criminal law. There was a larceny of coal. The next morning the stolen coal was found in the place where plaintiff kept his coal. It was stolen by his son and Wilson. Plaintiff was at his house in the morning. There was enough

from which to infer his guilty knowledge, and to justify a criminal charge against him. The fact that he denied any knowledge of the larceny at the time, and that it afterwards appeared that he had no knowledge of it, does not destroy the justification of the charge against him. Crimes must be investigated. The criminal law must be enforced. The innocent will sometimes be charged with offenses. In cases where there is probable cause to believe them guilty, they have no action against their accuser. In this case there was probable cause, and hence plaintiff could not recover. The judgment of the court below is reversed.

WRIGHT, C. J., dissenting.—All the information which Colton, the prosecuting witness, and special agent for defendant, got, as to whether plaintiff McDonald had stolen the coal, he got from the plaintiff himself. That information, if believed, should have been a complete and satisfactory explanation. If not believed by Colton, it was his duty, before causing the arrest, to make diligent inquiry and investigation as to McDonald's character, and as to the truth of the explanation which he had given. This was not done, and therefore the arrest was without probable cause, as McDonald's explanation was fully corroborated by the subsequently developed facts.

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[Civil No. 230. Filed April 6, 1889.]

[21 Pac. 177.]

UNITED STATES OF AMERICA, Plaintiff and Appellee,  
v. COLIN CAMERON, Defendant and Appellant.

1. PUBLIC LANDS—MEXICAN GRANTS—EVIDENCE—REPORT OF SURVEYOR-GENERAL—ACT JULY 15, 1870 (16 STATS. AT LARGE, 304), AND ACT JULY 22, 1854, CITED.—The report of the surveyor-general upon a Mexican grant is not competent evidence for any purpose.
2. SAME—SAME—WITDRAWAL—ACT OF 1870.—Act of 1870, *supra*, does not confer power upon the surveyor-general or the secretary of the interior to reserve from sale lands claimed to be within a valid Mexican grant.

3. MEXICAN GRANTS—KINDS—STRICTLY CONSTRUED.—Mexican grants are of three kinds: (1) specific boundaries, (2) by quantity, or (3) grants of a certain place by name, with or without boundaries. This grant is of the second class. The *expediente* partakes largely of the nature of a judicial sale, and should be strictly construed. The rule that where there is a doubt as to what is conveyed, and the boundary is certain, but disagrees with the quantity mentioned, the latter is disregarded, and cannot be invoked where its application would defeat the evident intent.
4. PUBLIC LANDS—FENCING—COLOR OF TITLE—NO ADVERSE POSSESSION AS AGAINST THE UNITED STATES—GRANT—CONSTRUCTION—COLOR BY DEED LIMITED—COLOR DEFINED—"CLAIM OR COLOR" MEANS COLOR OF TITLE—VALIDITY TO BE DETERMINED BY COURT—EVIDENCE REVIEWED AND FENCE HELD UNLAWFUL INCLOSURE UNDER ACT OF FEB. 25, 1885, CH. 149, SECS. 1, 2, 23 U. S. STATS. AT LARGE, 321.—Defendant claims to own the land fenced under grant. He had no exclusive occupation prior to the building of the fence, nor can he hold by trespass, and acquire adverse title as against the United States and defend the right to fence by claim or color of title so acquired. His claim or color of title is based on his paper title, which is the *expediente*. No one can claim color of title by deed, when entering upon land, beyond what his deed purports to convey. Color of title is where there is an apparent colorable title under which an entry or claim has been made in good faith. "Claim and color" mean the same as color of title. Where the defendant claims the right to fence upon a claim or color of title derived from paper title, the court has the power to ascertain the extent thereof, but not the validity of the grant, and when it further appears that the lands fenced are far from the lands described therein and include no lands ever occupied by, or in the possession of, the defendant under the deed, such cannot be a claim or color of title and the fence so erected is an unlawful inclosure of the public lands.

DISMISSED.—146 U. S. 533, 36 Law Ed. 1077, 13 Sup. Ct. Rep. 184.

REINSTATED AND REVERSED.—148 U. S. 301, 37 Law Ed. 459, 13 Sup. Ct. Rep. 595.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Jeffords & Franklin, and Rochester Ford, for Appellant.

O. T. Rouse, United States District Attorney, for Appellee.



BARNES, J.—This is a civil suit in which plaintiff alleges that defendant has unlawfully inclosed a portion of the public lands in violation of sections 1 and 2 of the act entitled “An act to prevent unlawful occupancy of the public lands,” approved February 25, 1885. The defendant admits the construction of a fence at the place alleged, but denies that the lands inclosed are public lands, and alleges that they are within the boundaries of the private land claim San Rafael de la Zanja, a Mexican grant, which has been filed with the surveyor-general of Arizona, as is provided for in the act of July 15, 1870, (16 Stats. at Large, 304). There it is provided that it shall be the duty of the surveyor-general of Arizona, under such instructions as may be given by the secretary of the interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties enjoined, upon the surveyor-general of New Mexico by the eighth section of the act entitled “An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes,” approved July 22, 1854, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper. In the petition the claimants urged or laid claim to about sixteen square leagues, or about 117,000 acres, of land. As evidence thereof they filed with their petition title papers called an “*expediente*.” The surveyor-general reported that the claim was valid, and that the amount of land conveyed was four square leagues,—three in a line north and south, and one to the west of the southern square league. His report was laid before Congress, where the same awaits action. It is insisted that the report of the surveyor-general is not competent evidence for any purpose, and it is so held in *Pinkerton v. Ledoux*, 129 U. S. 346, 9 Sup. Ct. Rep. 399.

This case has been argued by counsel upon the assumption that the act of 1870 above quoted is the same as the act of 1854, referred to in the act of 1870. They, however, are not the same, but differ very materially. In the former law it was provided: “And until the final action of Congress on

such claims, all lands covered thereby shall be reserved from sale or other disposal by the government." This provision was omitted from the act of 1870. It was by this provision of the act of 1854 that lands were reserved. As this provision is not retained, we must infer that it was omitted intentionally; that it was not intended that lands should be reserved. And no authority is given the surveyor-general or the secretary of the interior to reserve from sale lands that were claimed to be included within a valid Mexican grant. In other words, it is evident that Congress intended to retain control over the whole question, and to delegate to no one beyond the limit of the terms of the act. *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. Rep. 525. The claimant under a grant acquired no higher, broader, or better right by the act of 1870. The act simply afforded him a tribunal, and a procedure to enforce his rights under the grant. It did not give him the right to fence he did not have before, nor does the act of 1885 confer any right to fence. It prohibits the inclosure of the public lands. In *Ryan v. Railway Co.*, 99 U. S. 388, the court says that lands embraced in such a claim (a Mexican grant) are to be regarded as forming a part of our public domain, only after the claim conveying them has been finally rejected. But what is the "claim"? Is it the petition of the claimant? If so, this fence is within what he claims. If the petition mark the limits of the claim, then we are led to the absurd conclusion that under a valid grant for a few acres a claimant in his petition may insist upon a vast domain, no matter how wide, and at once fence it up, exclude everybody else from it, and retain the uses and profits of it until Congress shall act. No one can contend for a moment for such a construction of the acts of 1870 and 1885. With every claim filed with the surveyor-general are filed the title papers upon which the claim is based, as a part of it, and the lands therein described as granted thereby are the lands embraced in the claim. This brings us necessarily to a consideration of these title papers, and forces the court to a construction of the same, to see what lands are actually granted, as a measure of the claim and color of title.

Concessions or grants of land by Mexican governors were of three kinds. They were concessions or grants by,—1.

Specific boundaries, where of course the donee is entitled to the entire tract; 2. Or grants by quantity, as of one or more *sitios* of land situate at some designated place, or within a larger tract, described by what are called "out boundaries," where the donee is entitled to the quantity specified, and no more; or, 3. Grants of a certain place or rancho, by some particular name, either with or without specific boundaries. *Higuera v. United States*, 5 Wall. 834; *Hornsby v. United States*, 10 Wall. 232; *Alviso v. United States*, 8 Wall. 339. With great ability and learning, counsel for defendant has urged that this claim belongs to the first class. We are not able, however, to concur with this view, but must retain the opinion that it belongs to the second class. The Fremont case, 17 How. 542, was held to belong to the second class. Hornsby's case, 10 Wall. 232. That was a petition for 10 *sitios* (*sitios de ganada mayor*) north of a river, within the Sierra Nevada in the east part of Merced, on the west with the name "Mariposas," and the grant was to a tract of land known as the "Mariposas" within the limits before described. This grant is very similar to the one at bar, except that there was no survey of the place. This was held to be a grant of ten *sitios*, and the boundaries were held to no more than locate the place. *United States v. Pico*, 5 Wall. 539, is a case of the first and third class,—a grant by boundaries, where the grant gives the boundaries, with no limitations as to the amount. "When in Mexican grants boundaries are given, and a limitation upon the quantity embraced within the boundaries is intended, words expressing such intention are generally used. Thus in Fremont's case the boundaries embraced many *sitios* more than the quantity granted. Pico's case, 5 Wall. 539. Higuera's case, 5 Wall. 834, was of the latter class. In Yontz's case, 23 How. 498, it was held in adjudicating these grants that it is proper to look at all the several parts and ceremonies necessary to complete the title, and to take them as one act;" that "this court has uniformly held . . . that the petition to the governor for land and his concession must be taken as one act, and the decree usually proceeded on the petition which described the land, as respected locality and quantity." In that case "the application was for two leagues, more or less, according to the bound-

aries of said mission of San José." The judgment of the court restricting the grant to two *sitios* was affirmed. Fos-  
sat's case, 20 How. 415, was a grant of a portion of the place  
known by the name "Los Capitancillos," and the portion  
thereof confirmed is bounded and described as follows, to wit,  
(boundary) "the said premises containing three fourths of  
a square league of land, a little more or less." Counsel in  
that case urged the same grounds as here, and cited the same  
cases. Page 423. But the court decides: "We reject the  
words 'a little more or less,' as having no meaning in a  
system of location and survey like that of the United States,  
and that the claim of the grantee is valid for the quantity  
clearly expressed." Had it not been so clear, the court say,  
"it might have been proper to refer to the petition and the  
*diseno*. . . . But there is no necessity for additional inquiries.  
The grant is not affected with any ambiguity." It was held  
to be a grant for three fourths of a *sitio*, or square league.  
In D'Aguires's case, 1 Wall. 316, the grant mentioned no  
quantity, and reserved no surplus, and the court say the  
boundary must govern. The above-cited cases came up from  
California under the laws of the Mexican republic. The  
claim before us was petitioned for of the Spanish govern-  
ment, but the final decree was made by officers of the re-  
public. The laws were not, however, materially changed. The  
term "*sitio ganado mayor*" is a technical Spanish and Mexi-  
can legal term, as well established, defined, and known as a  
section or township in the surveys of the United States. It  
was a square, "the four sides of which each measured 5,000  
*varas*." Hamilton's Mexican Law, 103. "The distance from  
the center of each *sitio* to each of its sides should be measured  
directly to the cardinal points of the horizon, and should be  
2,500 *varas*." This term is found in the case before us, as  
well as in the cases cited. A conveyance of a *sitio* deeded  
as certain a form and quantity of land as a conveyance of a  
section. To convey a section would always mean a square,  
the sides pointing to the four cardinal points, each one mile in  
length, containing 640 acres.

In this case a grant of four *sitios* is asked for, and nowhere  
throughout the whole *expediente* is any other quantity men-  
tioned, and in the final decree the *habendum* clause grants

four *sitios*. The price *per sitio* is appraised, three at \$60, as having water, and one at \$30. The whole *expediente* partakes largely of the nature of a judicial sale, and should be construed by the same rules, that is, strictly. 2 Blackstone's Commentaries, 347; *Hyman v. Read*, 13 Cal. 445; *Charles River Bridge v. Warren Bridge*, 11 Pet. 589. It is a procedure provided by law, invoked by grantee's petition, and should not be construed as a private deed or conveyance. The whole record should be taken and construed together, in order to determine what is granted. So construing the same, it is evident that this is a grant of four *sitios* at the place San Rafael de la Zanja, and no more.

It is urged that the words of limitation, viz., four *sitios*, are to be disregarded as *falsa demonstratio non nocet*, and the survey be treated as measuring the land conveyed, and, as that includes sixteen, instead of four, *sitios*, that must govern. We are aware of the principle invoked, that where there is a doubt as to what is conveyed, and where the boundary is certain and disagrees with the quantity mentioned, the latter is false *non nocet*. But this rule is established, and can be invoked, only to aid the evident intent. Where to apply the rule defeats the evident intent, it is disregarded. Cases cited *supra*. And see *Webb v. Webb*, 29 Ala. 606; *Davis v. Rainsford*, 17 Mass. 210; *Jackson v. Loomis*, 18 Johns. 81; *Norwood v. Byrd*, 1 Rich. 135, 42 Am. Dec. 406; *Jackson v. Blodget*, 16 Johns. 172; *Proctor v. Pool*, 4 Dev. (15 N. C.) 370. Four *sitios* at the place La Zanja can be no other than the four *sitios* that touch that point; that is, that corner there. Any other construction makes this grant void for uncertainty. *Shackleford v. Bailey*, 35 Ill. 391; *Peck v. Mallams*, 10 N. Y. 530.

It is urged, however, against this view that the act of 1885 prohibited all inclosures of any public lands by any person who had "no claim or color of title thereto, made or acquired in good faith." And it is insisted that defendant claims to own the lands fenced, and has urged his claim by petition to the surveyor-general under the act of 1870, who has reported thereon, and that the claim is pending before Congress; that this is the very question there pending; that his right thereto is the question in dispute; that that is the tribunal established

for the consideration of the validity and extent of his grant; that defendant urges before that tribunal that construction of this *expediente* which leads to a confirmation of his title to these lands; in short, that defendant has a claim and color of title to the lands fenced, and, if so, is not prohibited to fence the same by the act of 1885. The evidence in this case shows that prior to the erection of the fence defendant had no exclusive possession of these lands. They were open, unfenced, and apparently a part of the public domain. Cattle roamed and grazed over them. The only occupation defendant could claim was that cattle bearing his brand were ranging there. There was nothing to hinder other cattle ranging there. These acts do not constitute an open, notorious, and adverse possession of which all are charged with notice. To determine whether defendant had claim or color of title we are driven to the deed or *expediente*, upon which his color is based, and by which he justifies. By possession or occupation he can acquire no claim or color of title as against the United States. He cannot hold by trespass, and acquire an adverse title, and defend the right to fence by claim or color of title so acquired. But we have seen he has not such possession, adverse to the United States or anybody else. His claim or color of title can be based upon nothing but the paper title under which he claims, which is the *expediente*. He invokes it for his benefit. By virtue of it he fenced the lands, and asserted right thereto. The court was driven then to look into his paper title to see what lands are conveyed, and hence to a construction thereof. *United States v. Cattle Co.*, 33 Fed. 323. No one can claim color of title by deed, when entering upon land, beyond what his deed purports to convey. *Woods v. Banks*, 14 N. H. 111; *Brooks v. Bruyn*, 35 Ill. 394; *Shackleford v. Bailey*, 35 Ill. 391; *Russell v. Erwin*, 38 Ala. 48; *Minot v. Brooks*, 16 N. H. 376; *Tate v. Southard*, 3 Hawks 119, 14 Am. Dec. 578. Color of title is where there is "an apparent colorable title under which an entry or claim has been made in good faith." *Wright v. Mattison*, 18 How. 56; *Edgerton v. Bird*, 6 Wis. 527; *Thompson v. Cragg*, 24 Tex. 594; *Bernal v. Gleim*, 33 Cal. 676; *Beverly v. Burke*, 9 Ga. 443, 54 Am. Dec. 351; *Rannels v. Rannels*, 52 Mo. 112. In Illinois, a statute of

limitations created a bar in favor of one in actual possession of lands under claim and color of title made in good faith. This statute is the same as the act of 1885, except that this act uses the words "claim or color," etc. It was held that these words mean the same as color of title, and the possession must be under a deed purporting to convey the lands claimed. *Woodward v. Blanchard*, 16 Ill. 433; *Dawley v. Van Court*, 21 Ill. 460; *Holloway v. Clark*, 27 Ill. 483; *Morrison v. Norman*, 47 Ill. 477; *Huls v. Buntin*, 47 Ill. 400; *Dickenson v. Breeden*, 30 Ill. 325; *Cook v. Norton*, 48 Ill. 20; *Chickering v. Failes*, 26 Ill. 519; *Laftin v. Herrington*, 16 Ill. 301; *Hinkley v. Greene*, 52 Ill. 227; *Dolton v. Erb*, 53 Ill. 289; *Fritz v. Joiner*, 54 Ill. 101; *Shackleford v. Bailey*, 35 Ill. 391. And it was decided that the court must determine the validity of the color of title. *Shackleford v. Bailey*, 35 Ill. 391; *Blanchard v. Pratt*, 37 Ill. 245. See note to *Tate v. Southard*, 14 Am. Dec. 580. There can therefore be no doubt as to the power of the court to look into defendant's paper title, when he defends his right to fence these lands upon a "claim or color of title" derived from this paper title, to ascertain the extent thereof, but not the validity of the grant. As we have said above, the lands fenced are far away from the four *sitios* cornering at the point La Zanja, and include no lands ever occupied by, or in possession of, defendant under the deed. The evidence shows that the defendant occupies a ranch-house, out-buildings, and *corral*, in all a few acres, at La Noria, and another on another part of the premises claimed, and that cattle are pastured on the surrounding domain. The lands fenced are several miles away from any habitation or actual occupation. Such cannot be a claim or color of title in any sense. The fence so erected was an unlawful inclosure of the public lands. We see no error in the judgment, and the same must be affirmed.

Wright, C. J., and Porter, J., concur.

[Civil No. 248. Filed April 15, 1889.]

[21 Pac. 465.]

T. W. JOHNSTON, Plaintiff and Appellee, v. R. E. MORRISON, Defendant and Appellant.

1. **LIBEL—PLEADING—INNUENDO—PROOF MUST CONFORM THERETO.**—Where words are not actionable *per se*, and the plaintiff places his version upon them in his pleading, he will be bound thereby, and his proof must conform thereto.
2. **SAME—SAME—WORDS NOT ACTIONABLE PER SE—NECESSITY FOR AN INNUENDO—WHEN SURPLUSAGE.**—Where the libelous words, *prima facie*, are not actionable an innuendo is essential to the action. If actionable *per se*, the innuendo may be rejected as surplusage.
3. **WITNESSES—PARTIES—COMPETENT.**—Where a party is upon the stand as any other witness, he is competent to testify upon all matters material to the issues.

WRIGHT, C. J., dissents.

**APPEAL** from a judgment of the District Court of the Third Judicial District in and for the County of Apache. James H. Wright, Judge. Reversed.

The facts are stated in the opinion.

E. M. Sanford, for Appellant.

The words are not libelous *per se*. Words cease to be libelous *per se* the moment that they require an innuendo to explain what they mean.

When the words used by the defendant do not of themselves convey the meaning which plaintiff would attribute to them, and such meaning results only from some extrinsic matter or fact, it is essential that the extrinsic matter or fact upon which he relies to give them meaning must be set forth in the complaint. *Van Santvoord on Pleading*, 271, 272; *Christal v. Craig*, 80 Mo. 373; *Legg v. Dunleavy*, 80 Mo. 563, 50 Am. Rep. 512; *Pollard v. Lyon*, 91 U. S. 225; *Nidever v. Hall*, 67 Cal. 79, 7 Pac. 137; *Clark v. Fitch*, 41 Cal. 481; *Maynard v. Fireman's Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Townsend on Libel*, secs. 335, 336; *Van Vech-*



*ten v. Hopkins*, 5 John. 211, 4 Am. Dec. 339, note; *Estee* on Pleading, 1688; *Boone* on Code Pleading, 163.

The covert meaning must be explained and the true interpretation brought to light by a prefatory averment. *Estee* on Pleading, 3635.

Innuendos are not allegations, nor the subject of proof. *Van Vechten v. Hopkins*, 5 John. 211, 4 Am. Dec. 339, note; *Legg v. Dunleavy*, 80 Mo. 563, 50 Am. Rep. 512; *State v. Corbett*, 13 R. I. 289; *State v. Mott*, 45 N. J. L. 494; *Townsend* on Libel, 127, 129, 334, 335, 338.

It was the defendant's right to show the natural signification of the words, for, "Where the words are capable of two constructions, in what sense they were intended is a question of fact for the jury." *Townsend* on Libel, secs. 281, 286; *O'Donnell v. Hastings*, 68 Iowa, 271, 26 N. W. 433; *Roberts v. Cander*, 9 East, 95. The rule is, "First ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them." *Hankinson v. Bilby*, 16 Mees. & W. 443; *Campbell v. Campbell*, 54 Wis. 90, 11 N. W. 456.

Defendant should have been allowed to show his motives, objects, intent, and good faith; and to show that the article was published in the public interest and for justifiable purposes, and at least in mitigation of damages. *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671; *Pittsburgh A. and M. Co. v. McCurdy*, 114 Pa. St. 554, 60 Am. Rep. 363, 8 Atl. 230; *Bradley v. Cramer*, 66 Wis. 297, 28 N. W. 372; *Marks v. Baker*, 28 Minn. 162, 9 N. W. 679; *Crane v. Waters*, 10 Fed. 619; *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *Briggs v. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274, 2 Atl. 513.

All the facts and circumstances may be given in evidence by the defendant to show probable ground and to rebut malice. *Neeb v. Hope*, 111 Pa. St. 145, 2 Atl. 571; *Chapman v. Caldon*, 14 Pa. St. 365; *Thompson v. Sounding*, 15 Nev. 203; *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261.

Defendant is a competent witness under the statute to testify as to the construction of the language as well as plaintiff, and the jury could judge of the weight. *Klink v. Colby*, 46 N. Y. 434, 7 Am. Rep. 360; *Hastings v. Lusk*, 22 Wend. 400.

To know if the innuendo was broader than the words naturally bear, the jury were entitled to learn their natural signification. *Pollard v. Lyon*, 91 U. S. 233; *Campbell v. Campbell*, 54 Wis. 90, 11 N. W. 456.

Harris Baldwin, for Appellee.

In construing a publication alleged to be libelous, the scope and object of the whole article is to be considered, and such a construction put upon its language as would naturally be given to it. The test is whether in the mind of an intelligent man the terms of the article and the language used naturally import a disgraceful charge. If it does, the publication is libelous *per se*. *More v. Bennett*, 48 N. Y. 472; *Price v. Whitely*, 50 Mo. 439. Under the statutes of California and New York, it is settled that it is libelous *per se* to falsely impute to a person, in his trade, profession, or business, any kind of fraud, dishonesty, misconduct, incapacity, or unfitness. *Sanderson v. Caldwell*, 45 N. Y. 405, 6 Am. Rep. 105; *More v. Bennett*, 48 N. Y. 472; *Bergman v. Jones*, 94 N. Y. 51; *Wilson v. Fitch*, 41 Cal. 363; *Fitch v. De Young*, 66 Cal. 339; *Dixon v. Allen*, 69 Cal. 528; *Bettner v. Holt*, 70 Cal. 270.

Any publication is libelous *per se* which denies to a man the possession of some such worthy quality as every man is supposed to possess, or which tends to bring him into public hatred or disgrace, or to degrade him in society, or to expose him to hatred, contempt, or ridicule, or which reflects upon his character, or imports something disgraceful to him, or throws contumely on him, or odium, or tends to villify him or injure his character or diminish his reputation, or which is injurious to his character, or shows him to be immoral or ridiculous, or induces an ill opinion of him, or detracts from his character as a man of good morals, or alters his position in society for the worse, or imputes to him a bad reputation, or degradation of character, or ingratitude, and all defamatory words injurious in their nature. Townsend on Slander and Libel, 3d ed., secs. 176, 177; *Feder v. Herrick*, 43 N. J. L. 24; *Crane v. Riggs*, 17 Wend. 209; *Crosswell v. Weed*, 25 Wend. 521.

In an action for libel it is not necessary for the plaintiff

to prove affirmatively that he has sustained damage in consequence of the libelous publication. The law not only imputes malice to the defendant, but presumes that damages have been sustained by the plaintiff. *Sanderson v. Caldwell*, 45 N. Y. 398; *Lick v. Owen*, 47 Cal. 252.

The rule is, that when the publication is actionable upon its face, and is not uttered on a lawful occasion and with justifiable motives, the law infers malice, although none be proved. 3 Sutherland on Damages, pp. 660, 661.

An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown. Rev. Stats. Arizona, p. 708, sec. 406. Such presumption cannot be rebutted by evidence. *Lick v. Owen*, 47 Cal. 252. The averments of the complaint are sufficient. 1 Estee's Pleadings, 3d ed., sec. 1698.

The introduction by the appellant in evidence of certain indictments referred to in the libel does not establish the truth of the publication so far as the libelous parts are concerned. *Price v. Whitely*, 50 Mo. 439.

The publication being actionable *per se*, the appellant cannot show good faith, motive, or purpose, neither can he show his intent. Estee's Pleadings, secs. 1668, 1670.

PORTER, J.—This is an action for libel, alleging that the defendant printed and published a certain publication which was a libel on defendant. The portion of the publication as to which most of the testimony related is as follows: "A certain gang of rustlers, in the southern part of the county, known as the 'Clanton-Stanley Outfits,' who had been a terror for years, were last summer 'run to ground' and lodged in the county jail. The notorious Fin Clanton was put upon trial with fifteen indictments for cattle stealing against him. Previous to the arrival of a near relative of the district attorney, [thereby meaning and referring to this plaintiff,] Clanton had retained two lawyers of acknowledged ability to defend him; but, when this new 'actor' [thereby meaning this plaintiff] appeared upon the scene, his relationship [meaning plaintiff's relationship to the district attorney of Apache County, said territory,] secures his [meaning plaintiff's] employment by Clanton. Such pressure is brought to

bear that Clanton is convicted and sentenced to ten years at Yuma, and now begins the 'fine work,' [meaning and intending by 'fine work' the unlawful bribing of said district attorney by this plaintiff]. Mr. Relative [meaning this plaintiff] appears for Stanley, against whom there is at least three or four sure cases, and suggests that, with the consent of his [meaning plaintiff's] brother-in-law, the district attorney, a compromise has been effected, to the effect that Stanley is to be banished from the territory of Arizona, and he [Stanley] shall not even be required to plead guilty, [meaning and intending thereby that this plaintiff had unlawfully and corruptly bribed said district attorney and wrongfully induced said district attorney to permit this plaintiff's client, said Stanley, to leave the territory of Arizona without pleading guilty to the indictments standing against him, and thus escape punishment]."

If the words "fine work," as set forth in the complaint, are actionable *per se*, no construction of the language is needed. We do not think they are actionable *per se*, and, not being so, plaintiff in his pleadings places his version of the language, and he must be bound by it. We will take it for granted that his pleadings are all that is required, as not being necessary to state extrinsic matter. We incline to think there has been a compliance with our statutes. But his proofs must be confined to his allegations of his meaning of the defamatory words published. In Odger's Libel and Slander, on page \*99, the author says: "In arriving at the meaning of the defendant's words, the court and jury are often materially assisted by an averment in the plaintiff's statement of claim, called an 'innuendo.' This is a statement by the plaintiff of the construction which he puts on the words himself, and which he will endeavor to induce the jury to adopt at the trial. Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary, though even there the pleader occasionally inserts one to heighten the effect of the words. But, where the words *prima facie* are not actionable, an innuendo is essential to the action. It is necessary to bring out the latent injurious meaning of the defendant's words, and such innuendo must distinctly aver that the words bear a specific actionable meaning." Plaintiff

must stand by his pleading at least in regard to the innuendo. *Strader v. Snyder*, 67 Ill. 404. If the words are not actionable *per se*, it will be the province of the jury to say whether the plaintiff's construction of the words is borne out by the evidence. If the words are actionable *per se*, the innuendo may be rejected as surplusage. The plaintiff chooses his own battle-ground, and is expected to fight on it, and he does there show fight, for he introduces testimony as to the meaning of "fine work."

John C. Herndon, an attorney, who had defended Stanley in connection with the plaintiff, testified: "I would say, in reading the article, I would think from these words 'fine work' that the idea intended to be conveyed would be improper work. There was no impure work, as far as I know of; i. e., I don't understand the meaning of the words 'fine work' in this article to mean the intended bribing. I will not say that I would be willing to swear that the meaning is unlawful bribery. That article does not give any idea as to that." Robert Scott, examined for plaintiff, says: "Taking the entire article, I think that 'fine work' means bribing the district attorney. 'Fine work' applies to what follows, and means something illegally done." J. T. Lessuer, sworn for plaintiff, says: "I think the article charges Mr. Johnston with certain wrongs; that he had done wrong work. I understand it to mean something pretty slick. . . . I got my definition of the words 'fine work' from the whole article, and not from a part of it. I take it from the article that the compromises were illegal. . . . From my understanding of that article, they had no right to make compromises, and the words 'fine work' mean an unlawful action." Dr. Dalby, for plaintiff, testified: "My opinion is 'fine work' means anything illegal. I base my opinion upon the article, nothing else. My construction was that it meant improper transactions on the part of Johnston. In the Stanley case the article gives the meaning that they had no authority to make the compromise." Mr. McDonald, for plaintiff, testified: "'Fine work' is used there to mean corruption of the district attorney. . . . 'Fine work' has different meanings. As I stated in reference to this article, 'fine work' is owing to what you construe it to mean. 'Fine work' is noble work.

It has a double meaning, according to how you construe it. 'Fine work,' in connection with this article, is that of corruption." Barry Matthews, for defendant, testified: "'Fine work' is, of course, not ordinary work. 'Fine work' means something skillfully done. It means anything that is skillfully, adroitly, and successfully done. It applies to this article, and means something that is done here by some such scheme, which one is left to imagine. Knowing them, I put it together, and got the construction intact. It might be some sort of successful work or the other. I have said I might alter my construction of it. Knowing Baldwin, as I did, I do not think for a moment that bribing was intended. I could not think it was bribery. The first inference I could think of was a collusion of these parties. Bribery? Well, I did not think of such a thing; of course, it allowed of a collusion between the parties for some purpose." T. W. Nelson was called and examined for defense, and testified: "My understanding of the words 'fine work' in that article is successful completion; result effected. I don't understand it to mean anything unlawful that was done by the district attorney. I understand, from reading the whole article, that Johnston was enabled by some means or other to do more effectual work. *Question.* Now, sir, state whether or not, at the time of reading the article, you put upon it the construction that there had been bribery done. (Objection sustained.)" On cross-examination by Mr. Baldwin, witness said: "I did not take the article to mean that it was Johnston who could bribe him. I thought from reading the article that you would do things for him that you would not do for any other attorney. I thought that Johnston would be more successful in his business, as you were district attorney, and a relative. I am a sworn friend of Morrison, and I am not a sworn friend of Johnston, nor of you." R. E. Morrison, the defendant, was asked: "What did you intend to say at the time you used the words 'fine work'?" (Objection made, and sustained by the court; and again he was asked:) Do you know what is the ordinary meaning of the words 'fine work'?" (Objection made, and sustained; and further:) State whether or not, if you know the ordinary significance of the words, 'Mr. Relative appeared for Stanley, and suggested that,

with the consent of his brother-in-law, the district attorney, a compromise had been effected to the effect that Stanley is to be banished from the territory of Arizona, and he shall not be required to plead guilty.' (Objection made and sustained.)"

We thus find that the plaintiff sought to prove the intent of words used in the article imputed bribery to him, and a number of witnesses testified thereon. The defendant, when placed upon the stand, was asked what meaning he intended to convey when he used the words "fine work." We think that was an improper question. An apt illustration is given in *Odgers on Slander and Libel*, p. 108: "You stole my apples." The defendant cannot be allowed to state that he only meant to say: "You have tortiously removed my apples under an unfounded claim of right." But when asked whether he knew what is the ordinary meaning of the words "fine work," and also the significance of other words of the complaint, it was denied him to answer. He was on the stand as any other witness, and should not have been precluded from giving an interpretation of the words; and for this refusal we conclude that there was error.

We think that the court also erred in refusing to give the twentieth special request asked for by defendant, which is as follows: "The plaintiff having, in what is termed an 'innuendo,' alleged that the words 'fine work' were intended by the defendant to be understood by the readers thereof as meaning that the plaintiff had unlawfully bribed the district attorney of this county, the plaintiff is bound by that construction, and he must prove that the words were understood by the readers, by a preponderance of evidence, as meaning that the plaintiff had unlawfully bribed the district attorney of this county, and cannot recover upon any other meaning or construction of said words."

The court also erred in refusing to grant defendant's twenty-eighth special request, which is as follows: "The plaintiff having, in what is termed an 'innuendo,' attempted to explain that the words following, to wit: 'Mr. Relative appears for Stanley, against whom there is at least three or four sure cases, and suggests that, with the consent of his brother-in-law, the district attorney, a compromise had been

effected to the effect that Stanley is to be banished from the territory of Arizona, and he shall not even be required to plead guilty,'—were intended by defendant to be understood by the readers thereof as meaning that plaintiff had unlawfully and corruptly bribed the district attorney of this county, or wrongfully induced said district attorney in permitting plaintiff's client, Stanley, to leave the territory of Arizona without pleading guilty to the indictment standing against him, and thus escape punishment; the plaintiff is bound by that construction, and he must prove to your satisfaction, by a preponderance of evidence, that those words were understood by the readers thereof that plaintiff had unlawfully and corruptly bribed the district attorney of this county, and wrongfully induced said district attorney to permit the plaintiff's client, Stanley, to leave the territory of Arizona without pleading guilty to the indictments standing against him, and thus escape punishment." The judgment is reversed, and a new trial ordered.

Barnes, J., concurs.

WRIGHT, C. J.—I must respectfully dissent from the views expressed in the opinion of the court.

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[Civil Nos. 250 and 255. Filed June 3, 1889.]

[21 Pac. 768.]

TERRITORY OF ARIZONA, Plaintiff and Appellee, v.  
DELINQUENT TAX-LIST OF THE COUNTY OF  
MOJAVE FOR THE YEAR OF 1887. ATLANTIC  
AND PACIFIC RAILROAD COMPANY, Defendant  
and Appellant.

SAME v. DELINQUENT TAX-LIST OF THE COUNTY  
OF YAVAPAI FOR THE YEAR OF 1887. Same Ap-  
pellant.

1. TAXATION—ACTION FOR THE COLLECTION OF DELINQUENT TAXES—  
REV. STATS. ARIZ. 1887, TITLE 56, CH. 7, CITED AND CONSTRUED  
—PROCEEDING IN REM—APPEARANCES GENERAL—OBJECTION LIMI-



TED TO LEGALITY OF TAX.—Proceedings under the statute, *supra*, to collect delinquent taxes are proceedings *in rem*. Any party appearing does so voluntarily, and thereby waives all objections save as to the legality of the tax.

2. STATUTORY CONSTRUCTION—ADOPTION OF STATUTE OF ANOTHER STATE—JUDICIAL INTERPRETATION BY COURTS OF SUCH STATE PRIOR TO ENACTMENT ALSO ADOPTED.—Where the territory has adopted a statute of another state and such statute has been construed by decisions of that state, promulgated before it was enacted by this territory, such construction is also adopted.
3. SAME—EXCESSIVE—POWER OF COURT LIMITED—FRAUD.—The district court in such cases has no power to rectify excessive taxation, except in cases of fraud.
4. SAME—SAME—EQUALIZATION—POWER OF BOARD OF SUPERVISORS—REV. STATS. ARIZ. 1887, PAR. 2649, CONSTRUED.—Where the board of supervisors are empowered to act as a board of equalization by statute, *supra*, and to hear objections to assessments, there is a necessary implied power that they decide the same and carry the decision into effect.
5. SAME—EXEMPTION—RAILWAY RIGHT OF WAY—IMPROVEMENTS—SITUS OF ROLLING-STOCK—RAILWAY CO. v. LESUER, 2 ARIZ. 428, 19 PAC. 157, FOLLOWED.—The exemption of a right of way belonging to a railroad does not carry with it the exemption of improvements attached thereto. *Railway Co. v. Lesuer, supra*, followed. This case also determines the *situs* of rolling-stock.
6. SAME—ASSESSMENT—HOW MADE—EVIDENCE—WHAT ASSESSED.—Where the statute provides that assessments shall be made upon various enumerated items, it does not mean that the value of each item by which the conclusion is reached shall appear on the assessment-roll. It means that they shall be considered. Where it appears the right of way and franchise were not regarded as taxable, the record shows the value of these is not included.
7. SAME—PENALTIES—GROSS AMOUNT.—Penalties and percentages should not be fixed at a gross amount and imposed upon the tax upon both the railway and lands.
8. SAME—UNSURVEYED LANDS.—Unsurveyed lands assessed should be excluded.

APPEALS from the judgments of the District Courts of the Third Judicial District in and for the Counties of Mojave and Yavapai. James H. Wright, Judge. Remanded for modification in accordance with opinion.

The facts are stated in the opinion.

William C. Hazeldine, Solicitor for Appellant. J. A. Williamson, and E. M. Sanford, of Counsel.

John A. Rush, Attorney-General, for Appellee.

Abstracts of the briefs filed in these cases will be found in the Apache County case, *ante*, p. 69.

BARNES, J.—These cases are in this court on appeal from the district court of Yavapai and of Mojave Counties from the judgment against the Atlantic and Pacific Railroad Company for delinquent taxes. The proceedings are based upon chapter 7 of the revenue laws of the Revised Statutes. This chapter provides for the publication of the delinquent list by the tax-collector, and for the filing of a complaint thereafter in the district court by the district attorney; and provides that the said court shall thereby acquire full and complete jurisdiction over the lands and property described. The requirements of the statute seem to have been met substantially in these cases. Many objections are urged which should be considered as mere irregularities or informalities in the proceedings, and which are saved by the statute which provides that no assessment of property, or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax-list, assessment, or duplicate assessment-rolls, or on account of their not having been made, completed, or returned within the time required by law, or on account of the property having been listed without name, or in the name of any other than that of the rightful owner. Power is given the court to amend as in personal actions. If defense, specifying in writing cause of objections, be offered by any person interested in any of said property, the court is required to hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be. These are proceedings *in rem*. Any party appearing does so voluntarily, and he thereby waives all objections to the mode of reaching the results, and can be heard only as to the legality of the tax upon the property. This he cannot avoid by limiting his appearance for the purpose of objections to mere irregularities. The statute above referred to is taken from the revenue law

of Illinois of 1871-1872, and by the courts of that state has received this liberal construction. The law was intended to meet the obstructions which had constantly been placed in the way of the collection of taxes, and to overturn the law as it had been laid down by the courts before that, and by legislative enactment to lay down new rules of procedure and of construction. In a line of decisions in that state, promulgated before this enactment by this territory, this statute had been construed, and by adopting it the construction was also adopted. Prior to the act, if a tax was not levied at the proper time, it was void. *McLaughlin v. Thompson*, 55 Ill. 249. It could not be corrected by the legislature. *Billings v. Detten*, 15 Ill. 218; *Keating v. Thorp*, 15 Ill. 220; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240. If description of land was not certain it was void. *Olcott v. State*, 5 Gilm. 481; *Meyer v. Pfeiffer*, 50 Ill. 487. Also if not certain in dollars and cents. *Lawrence v. Fast*, 20 Ill. 338, 71 Am. Dec. 274; *Gibson v. Chicago*, 22 Ill. 572. If part was illegal, whole was void. *McLaughlin v. Thompson*, 55 Ill. 249; *Foss v. Chicago*, 56 Ill. 359. These are a few of the numerous decisions in that state which led to the enactment of this statute. In *Beers v. People*, 83 Ill. 493, that court says that these enactments were no doubt designed "to remove and wipe out all mere technical objections in the raising of the revenue." *Hotel Co. v. Lieb*, 83 Ill. 608; *Law v. People*, 87 Ill. 417. Again, they say that by this law "nearly, if not all, our previous decisions have been abrogated as rules for the determination of cases arising after the adoption of this amendment. *Thatcher v. People*, 79 Ill. 602; *Purrington v. People*, 79 Ill. 13; *Wright v. People*, 87 Ill. 586; *Moore v. Fessenbeck*, 88 Ill. 423; *Railroad Co. v. Surrell*, 88 Ill. 535. This disposes of a large number of the points urged upon us by appellant, and it is not necessary to refer to them *seriatim*, and leaves us to consider only those which go to the legality of the tax.

It has been urged that the tax is excessive. The district court, in such a case as this, has not the power to rectify excessive taxation, except in cases of fraud. *Glass Co. v. McCaleb*, 81 Ill. 556; *Spencer v. People*, 68 Ill. 510; *Insurance Co. v. Pollak*, 75 Ill. 292; *Porter v. Rockford etc. R. R.*

Co., 76 Ill. 561. Section 2649 of the revenue law provides for the assessment of all taxable property belonging to railway corporations by the board of equalization. The board is required to meet for this purpose on the first Monday in June in each year. On or before the third Monday in June they are required to transmit the assessment to the boards of supervisors of the counties, with the apportionment allotted to each county. The section points out the duty of the board in detail, and it provides that at the meeting in August any railway company may appear and show why such assessment should be lowered or changed. It is contended that the act does not authorize the board to make alterations. The law is not to be construed as permitting so idle a thing as an appearance before a board for the purpose, and yet the board have no power to act. It is a necessary implied power where they are authorized to hear objections that they decide the same, and carry the decision into effect. The record shows that the board, at its June session, did assess the property of appellant; that at the August term appellant appeared before the board, and was heard, and the objections considered and acted upon. These proceedings appear to be regular.

It is contended that, as the right of way of the railway company is exempt, that exemption carries with it the exemption of all improvements attached thereto. That question has been disposed of, so far as this court is concerned, by the case of *Atlantic etc. Ry. Co. v. Lesueur*, 2 Ariz. 428, 19 Pac. 157, and we adhere to the decision in that case. That case disposes of another question raised in this case also, viz., the *situs* of the rolling stock. It appears from the record that the right of way was excluded from the assessment. Improvements thereon are assessed. It is contended that as the right of way is by the charter of appellant exempt from taxation its value should be fixed by the board of equalization, so that it clearly appear that the same is not taxed. Out of abundant caution, this would be well. The law provides that "assessments shall be made upon the entire railway within this territory, and shall include the franchise, right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds, buildings, telegraph lines, and all other property, real and

personal, exclusively used in the operation of such railway." This does not mean that the value of each item by which the conclusion is reached, shall appear in the assessment-roll. It means they shall be considered. As they regarded the right of way and franchise as not taxable, the record shows the value of these is not included in the result.

We find in the record that the penalties and percentages are fixed at a gross amount, and are imposed upon the tax upon both the railway and lands. This was error, and that item should be stricken out of the judgments.

It is conceded that the lands assessed in Mojave County are unsurveyed. That item should be stricken out. The judgment as to the assessment in Mojave County upon the railway of \$28,840.35 is affirmed. The Mojave case is reversed, without cost, for this modification of the judgment.

As to the Yavapai case, the judgment as to penalties is reversed for the same reason. The court below is directed to inquire whether any lands included in the assessment are without the limits of that county, and to exclude from the assessment such lands. Also to exclude any lands the court finds not to have been surveyed as a matter of fact. The judgment as to the railway tax of \$38,028.90 in Yavapai County is affirmed. Judgment will be rendered in the trial court according to this opinion, as is provided in section 2692, Revised Statutes.

Wright, C. J., and Porter, J., concur.

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[Civil No. 259. Filed June 10, 1889.]

[21 Pac. 818.]

THE SINGER MANUFACTURING COMPANY, Plaintiff  
and Appellant, v. CHARLES W. TILLMAN et al., De-  
fendants and Appellees.

1. PUBLIC LANDS—TOWN-SITES—ACT OF CONGRESS, MARCH 2, 1867, CITED—ENTRY IN TRUST—DEEDS TO ACTUAL OCCUPANTS—PRESUMPTION—OCCUPANT DEFINED.—Under the act of Congress, *supra*,

the probate judge of any county in Arizona has the power to enter land occupied as a town-site, and hold it in trust to be deeded to the actual occupants. In the absence of anything to the contrary, it will be presumed that when he has made a deed it was to the proper person, and one not interested in the land cannot question his acts. An "occupant," within the meaning of the act, is one who is a settler or resident of the town, and in the actual *bona fide* possession of the lot at the time the entry was made.

2. TITLE—PURCHASE OF OUTSTANDING TITLE—ESTOPPEL.—Purchase, by one in possession and claiming ownership, of another's claim of title, does not admit title in the grantor, and such purchaser is not estopped thereby to deny the validity of the claim thus purchased. Compare *Anderson v. Thompson et al.*, ante, p. 62, 20 Pac. 803.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. William W. Porter, Judge. Affirmed.

The facts are stated in the opinion.

H. B. Summers, and Baker & Campbell, for Appellant.

Weeden, with full notice of the foreclosure suit, *lis pendens* having been filed and summons having been published in his own newspaper in said suit, took a deed from the mortgagor, Meade, in April, 1883, and as his assignee secured a deed from the probate judge and entered upon the premises.

Weeden was bound by the decree of foreclosure, although not a party thereto. *Breon v. Strelitz*, 48 Cal. 645; *Wood v. Goodfellow*, 43 Cal. 185; *Horn v. Jones*, 28 Cal. 195; *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *Sharp v. Lumley*, 34 Cal. 615; *Daniels v. Henderson*, 49 Cal. 243.

Defendant seeks to defeat the lien of the mortgage by assuming that he acquired subsequently a paramount title. He did this, and could only do it as the grantee of the mortgagor, Meade, because the evidence shows that these premises were set aside by the town-site commissioners to Meade, and before Weeden could get a deed from the probate judge he had to procure a deed from Meade, and the deed shows upon its face that he is the assignee of Meade.

This subsequent title that Weeden, the grantee of the mortgagor, acquired inured to the benefit of the mortgagee. Comp.

Laws Ariz., ch. 42, secs. 33, 36; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Kirkaldie v. Larrabee*, 31 Cal. 456, 89 Am. Dec. 205; *Christy v. Dana*, 42 Cal. 175; *Sherman v. McCarthy*, 57 Cal. 507.

It may be claimed that when Meade held this land it was public land, and that after the execution of the mortgage herein, he abandoned it and then Weeden or any one else had a right to enter, take possession and thereby defeat the lien of the mortgage. Even if it was abandoned by Meade this abandonment could not defeat the mortgage. Courts of justice will not permit such an act to be done. *Alexander v. Sherman*, 2 Ariz. 326, 16 Pac. 45; *Kelly v. Berry*, 62 Cal. 488; *Stephens v. Mansfield*, 11 Cal. 363; *Richardson v. McNulty*, 24 Cal. 339.

The defendant claims that this action is barred by the statute of limitations. This is answered by the fact that the statute of limitations does not begin to run against a purchaser at a sheriff's sale until the sheriff's deed is delivered to him. *Jefferson v. Wendt*, 51 Cal. 573.

As to the defendant Tillman, his own evidence shows that he entered the premises as the tenant of Meade, on March 1, 1882. Comp. Laws Ariz., ch. 35, sec. 11, in force at the time of Tillman's entry and when this action was commenced, provides: "When the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, where there has been no written lease, until the expiration of five years from the last payment of rent, notwithstanding that such tenant may have acquired another title or may have claimed adversely to his landlord." In all cases where a party is in possession of lands in privity with the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title and assertion of title in himself, brought home to the owner, will satisfy the law. Short of this the party will still be regarded as holding in subserviency to the rightful title. Tyler on Ejectment, p. 876. Tillman stands in the same position as Weeden, holding as the grantee of Meade, *pendente lite*, with full knowledge of the foreclosure suit, and being bound by the judgment.

G. H. Oury, and Sloan & Stone, for Appellees.

Under the act of Congress of March 2, 1867, for the relief of citizens of towns upon the lands of the United States, the probate judge of any county in Arizona had the power to enter land occupied as a townsite, whenever the judge of a county court could under said act. After such power had been exercised by the probate judge, and the lands entered and patented, the power could not be questioned. The probate judge, after entering such lands, holds it in trust for the benefit of those actually occupying the townsite, and it is his duty to make deeds therefor, to the actual occupants respectively, and to none others, and when he has made a deed for a portion thereof to any person, it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person, and a person who has no interest in the land will not be allowed to question his acts. *Sherry v. Lamp-ron*, 11 Kan. 611.

An "occupant," within the meaning of the townsite law of Congress, is one who is a settler or resident of the town in the *bona fide* actual possession of the lot at the time the entry is made. One who has never been in the actual possession of a lot cannot be said to be an "occupant" thereof. *Hussey v. Smith*, 1 Utah, 129; *Pratte v. Young*, 1 Utah, 347.

The occupancy must be actual, and cannot be begun by agency, no one being allowed to take up lots by agent. The occupancy may be for residence, for business, or for use, but the residence, business, or use must be by the claimant. A party having a *bona fide* occupancy may afterward lease the ground and still retain his right thereto, and he may sell his claim, except that no contract either for the sale or lease which conflicts with the requirements that the title shall be made to an inhabitant who is an occupant and has an interest will be recognized in deciding to whom the government title shall go; and a party purchasing an interest in such property can have government title to the extent of such interest, provided he becomes an occupant. *Cain v. Young*, 1 Utah 361.

It is claimed by the plaintiff that, by reason of the fact that defendant Weeden obtained a quitclaim deed from Meade prior to his application to the probate judge for a deed, there-



fore he claims under Meade's title, and takes subject to the mortgage executed by Meade in favor of the plaintiff. This view of the case is not tenable. It is a well-settled principle that one in possession of and claiming to own title to land does not admit title in another because he buys the other's claim of title solely to quiet his own title and to avoid litigation. Such purchaser is not estopped by such purchase from denying the validity of the claim thus purchased. *Cannon v. Stockman*, 36 Cal. 533; *Leffingwell v. Warner*, 2 Blackf. 605; *Jackson v. Olitz*, 8 Wend. 440; *Jackson v. Duffendorf*, 3 John. 269; *Bradstreet v. Huntington*, 5 Pet. 438; *Alexander v. Pendleton*, 8 Cranch, 462.

## CITATIONS.

*Abandonment*—*Davis v. Butler*, 6 Cal. 511; *Gluckauf v. Reed*, 22 Cal. 468; *Richardson v. McNulty*, 24 Cal. 339; *Dyson v. Bradshaw*, 23 Cal. 528.

*Estopped by tenancy*—*Tewksbury v. Magraff*, 33 Cal. 237; *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *Lawrence v. Webster*, 44 Cal. 385.

*Adverse possession*—*Le Roy v. Rogers*, 30 Cal. 230, 89 Am. Dec. 88; *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722; *Cannon v. Stockman*, 36 Cal. 535, 95 Am. Dec. 205; *San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278; *Langford v. Poppe*, 56 Cal. 72; *Simson v. Eckstein*, 22 Cal. 580.

*Estoppel by deed*—*Schulman v. Garrett*, 16 Cal. 100; *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187.

BARNES, J.—This was a bill to quiet title by the plaintiff against defendants in possession. Plaintiff claims through a deed from the sheriff under a judicial sale for the foreclosure of a mortgage. The sheriff's deed is of date July 3, 1884. The lot sued for had been part of the public domain until April, 1883, when the probate judge made a deed to defendant Tillman, who, at the time, was an occupant of the premises, and had been from February, 1882, and has been ever since and is now an occupant with his co-tenant, Weeden. Under the act of Congress of March 2, 1867, for the relief of citizens of towns upon the lands of the United States, the probate judge of any county in Arizona had the power to enter land occupied as a town-site, and after such power had been exercised

by the probate judge, and the lands entered and patented, the power cannot be questioned. The probate judge, after entering such land, holds it in trust for the benefit of those actually occupying the town-site, and it is his duty to make deeds therefor to the actual occupants, respectively, and to none others, and when he has made a deed for any portion thereof to a person it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person, and a person who has no interest in the land will not be allowed to question his acts. *Sherry v. Sampson*, 11 Kan. 611. An "occupant," within the meaning of the town-site law of Congress, is one who is a settler or resident of the town, and in the *bona fide*, actual possession of the lot at the time the entry is made. One who has never been in the actual possession of a lot cannot be said to be an "occupant" thereof. *Hussey v. Smith*, 1 Utah, 129; *Pratt v. Young*, 1 Utah, 347. The occupancy referred to must be actual, and cannot be begun by agency, no one being allowed to take up lots by his agent. The occupancy may be for residence, for business, or for use, but the residence, business, or use must be by the claimant. A party having a *bona fide* occupancy can afterwards lease the ground and still retain his right thereto, and he may sell his claim, except that no contract, either for the sale or lease, which conflicts with the requirements that the title shall be made to an inhabitant who is an occupant and has an interest, will be recognized in deciding to whom the government title shall go; and a party purchasing an interest in such property can have government title to the extent of such interest, provided he becomes an occupant, (*Cain v. Young*, 1 Utah, 361,) thus showing no one is entitled to or can receive government title to a town lot unless he is in the actual, *bona fide* possession and occupancy of the lot. Neither this plaintiff nor his grantors and predecessors were, at the time of the entry by the probate judge, in the occupancy of the premises, or ever have been since the time of the execution of the mortgage. The mortgagor, at the time of the execution of the mortgage, was not an occupant of the premises, and he had no title, as the title was in the government until the issuance of the patent to the probate judge, under the town-site act. True, the evidence shows that Tillman entered upon the

premises as tenant of the mortgagor. He paid no rent, however, and when he asked his landlord to make repairs, he refused, saying he had nothing further to do with the premises. Tillman then claimed the premises adverse to all the world, and continued to occupy the same under such adverse claim until the probate judge conveyed to him. The mortgagor executed a quitclaim deed to him about that time, but he did not enter under it, or claim title through it. *Adams v. Binkley*, 4 Colo. 247; *Lechler v. Chapin*, 12 Nev. 65; *Leech v. Rauch*, 3 Minn. 451, (Gil. 332); *Carson v. Smith*, 12 Minn. 560, (Gil. 458); *In re Selby*, 6 Mich. 213; *Town Co. v. Maris*, 11 Kan. 148; *Sherry v. Sampson*, 11 Kan. 611; *Cook v. Rice*, 2 Colo. 135; *In re Selby*, 6 Mich. 193; *Cosfield v. McClelland*, 16 Wall. 331. He who is in possession of and claiming to own land does not admit title in another because he buys the other's claim of title, solely to quiet his own title and to avoid litigation. Such purchaser is not estopped by such purchase from denying the validity of the claim thus purchased. *Cannon v. Stockman*, 36 Cal. 535, 95 Am. Dec. 205; *Leffingwell v. Warner*, 2 Black, 605; *Jackson v. Oltz*, 8 Wend. 440; *Jackson v. Dieffendorf*, 3 Johns. 269; *Jackson v. Rightmyre*, 16 Johns. 327; *Bradstreet v. Huntington*, 5 Pet. 438; *Alexander v. Pendleton*, 8 Cranch, 462. The evidence shows that Mund was the only one of the persons through whom plaintiffs deraign title, who ever obtained any right by occupancy of these premises, and his right was extinguished long before the mortgage, by his failure to remain in possession or occupancy. The title of defendant in the premises should be confirmed. The judgment is affirmed.

Wright, C. J., and Porter, J., concur.

[Civil No. 257. Filed June 18, 1889.]

**EMMON P. RYDER, Plaintiff and Appellant, v. CHARLES W. LEACH et al., Defendants and Appellees.**

1. **PRESUMPTIONS—NORTH DEFINED.**—In the absence of overwhelming evidence to the contrary, "north" will be construed as meaning true north, as distinguished from magnetic north.
2. **APPEAL AND ERROR—CONFLICT IN EVIDENCE.**—Where there is a conflict in the evidence, the judgment of the trial court will not be reviewed.

**APPEAL** from a judgment of the District Court of the First Judicial District in and for the County of Cochise. William H. Barnes, Judge. **Affirmed.**

The facts are stated in the opinion.

Haynes & Mitchell, for Appellant.

Herring & Herring, and Ben Goodrich, for Appellees.

**PORTER, J.**—Defendants had applied for a United States patent for the mineral claim known as the Boss Mine, situated in Tombstone Mining District, Cochise County.

Pending the application for patent, plaintiff filed an adverse claim in the United States land office, for a portion of the ground described in said application, and in support of such adverse claim brought this action in the district court of Cochise County.

Plaintiff alleges that he is the owner of and in possession of a certain piece of ground which he describes as the "Little Venture" Mine, and alleges that the same was located by his grantors on the second day of January, 1885.

The action was brought by plaintiff to quiet title to the aforesaid premises.

The Boss Mine was located in June, 1878, by the grantors of defendants.

No question was raised by plaintiff of the fact of a continued compliance by defendants and their grantors from the time of the location of the Boss Mine to the commencement of

this action with the laws of Congress in relation to the annual expenditure of one hundred dollars upon said mine in labor and improvements.

The initial monument of the Boss Mine is fixed in the location notice of said mine, at the north end center of the Tribute Mine, thence a line runs forty-one degrees east to the western boundary line of the Sulphuret Mine.

No question is raised as to the fact that the initial monument of the Boss Mine is now at the point at the north end center of the Tribute Mine, exactly where the original location notice fixes it. Neither is any question raised that the line running north from this point terminates in the western boundary line of the Sulphuret Mine, but the contention before the court below by the plaintiff was that the point, in the western boundary line of the Sulphuret Mine, where the line terminates which is described as running "north forty-one degrees east" from the initial monument of the Boss Mine, should be determined by a magnetic course, without any allowance for the magnetic variation instead of by the true course of the meridian, and thus leave sufficient ground on the westerly side of the Boss Mine and adjoining the West Side Mine to fulfill the conditions of the Little Venture location.

If the line was a true meridian, then three hundred feet, or a very little less than that, running west along the line of the Sulphuret, will reach the point where the west side of the Northeast extension of the Sulphuret and Sulphuret touch or corner, and where the northwest corner of the Boss should be, if that was the course of the location when made.

The witness White testified that three days after the Boss location he saw a Boss monument at that point, Upton swears that he knew the Boss in 1880, and that he saw a 2x4 stake at that point with the word "Boss" cut in it, and saw it nearly every day for two or three years. Howe swears that he made the official survey of the West Side Mine in 1881, and that he then found a stake at that point marked northwest corner Boss, and that this was in a monument four and a half feet in diameter and four feet high.

Maps were introduced of the survey of the Sulphuret, showing this monument of the Boss. If the place where this monu-

ment was seen by White, Upton, Howe, and others was one of the established corners of the Boss, then the Boss claim covers the ground claimed by plaintiff. On this point the evidence was overwhelming and without contradiction. If that point was a corner, then the line from the initial monument according to the true meridian, runs within three hundred feet of that corner. The line of the magnetic meridian touches the Sulphuret about three hundred and fifty-eight feet from that corner. The difference between three hundred feet and three hundred and fifty-eight feet is too great to be accounted for by a mistake. If the location had been made by the magnetic meridian, the Boss northwest corner monument would have been located about fifty-eight feet farther east. When the line of the true meridian corresponds so closely to the monuments as to amount to accuracy, it is a practical demonstration that that was the line.

When you add to it the idea that north means north, and not the magnetic north, nothing short of overwhelming evidence will overturn the conclusion that the northwest corner Boss, as established by Howe, is the true corner.

Against this, in 1885, Sweazy says he saw a pile of stones along the line of the Sulphuret, and that he got a board with a straight edge and, starting at the center monument of the Tribute, the initial of the Boss, he sighted by the needle north forty-one degrees east, and that he saw the pile of stones at the point on the line of the Sulphuret where the line he was sighting cuts it. When this pile of stones was placed there, he does not know.

No other witnesses ever saw it before that. The Boss claim had been located and monumented seven years before that. This is all the evidence to sustain this view. All the rest is inference, argument, and speculation. The plaintiff asked for thirty days to procure the evidence of the witnesses Gird and Walker by deposition, which was granted. Great indulgence was given to aid the plaintiff. The evidence was not produced. On the motion for new trial, he asked that the same be granted so as to secure the evidence of these witnesses. It was not newly-discovered evidence. At best, it was mere cumulative evidence, and does not come within any of the rules by which new trials are granted to enable a party to pro-

duce other evidence. The affidavits besides do not show that the evidence would overturn the conclusive evidence in this case. It does not contradict the Boss northwest corner monument. It does not show that the true meridian was not run. The court did not err in refusing a new trial. There does not appear to be a question of law raised in the case. It was purely a question of fact, and the judgment must be clearly erroneous before we will disturb it. Where there is a conflict of evidence, we will not review the judgment of the trial court. The judgment is affirmed.

Barnes, A. J., and Wright, C. J., concur.

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[Civil No. 272. Filed July 8, 1889.]

[22 Pac. 383.]

**THE DIRECTORS OF THE INSANE ASYLUM OF ARIZONA, Petitioners, v. LEWIS WOLFLY, Governor of Arizona, Respondent.**

1. **MANDAMUS—AGAINST GOVERNOR.**—*Mandamus* is a civil remedy for the protection of purely civil rights, and will not lie, at the instance of officials of a branch of the executive department, to compel the governor to perform a public duty.

*Mandamus.* Original application. Writ denied.

The facts are stated in the opinion.

Goodrich & Street, for Petitioners.

Clark Churchill, Attorney-General, for Respondent.

BARNES, J.—It will be conceded that the governor, the head of the executive department of the government, is not amenable to the judicial department by *mandamus*, to direct him in the exercise of any of the powers intrusted to him as such, whatever the degree or character of the discretion imposed upon him. The executive and judicial departments have separate and distinct functions, clearly marked out, and each

is independent of the other. The authority to direct the governor by *mandamus* is denied by very high authority, and the difficulty of the enforcement of the writ has been suggested with great force. The court ought not to issue the writ unless it is prepared to enforce it. Without the means of enforcement the writ would be idle; yet to enforce it might deprive the territory of the executive, and public safety be jeopardized. *Low v. Towns*, 8 Ga. 360; *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 346, note. The right to direct the governor has been limited to the performance of a mere ministerial duty, where such an act has been required of him by law, and where the act is such a one as might have been imposed upon any other person, and to enforce a vested private right. This was the limit in the case of *Kendall v. United States*, 12 Pet. 524. Even in questions affecting private right, if the final decision is with the executive, and the act is a public act, he is independent. *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *State v. Chase*, 5 Ohio St. 535; *Chamberlain v. Sibley*, 4 Minn. 312, (Gil. 228); *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *People v. Hatch*, 33 Ill. 9; *Marbury v. Madison*, 1 Cranch, 170. In the latter case the chief justice declared: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated that any application to a court to control in any respect his conduct would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, the writ may issue."

Here is an application by trustees of one of the territorial charities,—the insane asylum,—a branch of the executive department, and whose commission they hold as authority for the public duties they perform, seeking to *mandamus* the executive to perform a public duty. They have no personal vested rights. They ask as officers, not as individuals. No



authority can be found where *mandamus* has been issued against a governor of a state or territory in such a case. It is a civil remedy for the protection of purely civil rights. High's Extraordinary Remedies, secs. 118, 430 et seq., and cases cited; *People v. University*, 4 Mich. 98. The act which is sought to be enforced upon the governor in this case is one that is included in the inherent functions of his office. He is the official head of the executive department of the territory, and, as such, the territorial, penal, and charitable institutions are subordinate to him. These trustees hold his commission, and he must see that the laws are faithfully executed by them. One of the means of doing so is to be found in the act sought to be enforced in this case. With it the courts have nothing to do, as the governor must take the responsibility, and it cannot by him or against him be shifted upon the judicial department. The writ is denied.

Wright, C. J., concurs, and will add his views.

Porter, J., dissents, and will add his views.

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[Civil No. 249. Filed July 9, 1889.]

THE UNITED STATES OF AMERICA, Plaintiff and Appellee, v. ONE HUNDRED AND FIFTY HEAD OF CATTLE AND FIFTY-TWO CALVES, Defendant and Appellant.

1. COSTS—ACTIONS AT LAW—LOSING PARTIES PAY COSTS.—In actions at law it is a general rule that losing parties are to pay the costs.
2. CUSTOMS—SEIZURE OF GOODS—PROCEEDINGS AT LAW—WHEN CLAIMANT LIABLE FOR COSTS—18 U. S. STATS. AT LARGE, 188, 189, SEC. 16 CITED.—In cases of seizure of goods for violation of the customs laws, the proceeding is at common law. Only in cases of a payment or forfeiture is the claimant or property seized liable for cost of same. Statute, *supra*, cited.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. William H. Barnes, Judge. Reversed.

The facts are stated in the opinion.

Jeffords & Franklin, for Appellant.

The court erred in rendering judgment in favor of plaintiff for the costs in this proceeding.

This was a proceeding to enforce the forfeiture of the property seized, the prayer of the information was for a judgment of forfeiture. There was no demand in the information for duties, and no allegation of the amount of duty due. Therefore the only judgment which the court could properly have rendered was a judgment of forfeiture or non-forfeiture.

Upon the finding of the court that the property was not imported with intent to defraud the revenue of the United States, there could have been no judgment of forfeiture.

The supplement to the Revised Statutes of the United States provides that in all actions to enforce a forfeiture of goods, wares, or merchandise where an issue of fact shall be joined, the court shall find as a distinct and separate finding whether the alleged acts were done with an actual intent to defraud the United States.

"And in such cases unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed." U. S. Stats. 1874, June 22, ch. 391, 18 Stats. at Large, 188, 189, sec. 16.

The supreme court of the United States has held that in cases of information for the seizure of goods, wares, and merchandise for the violation of the customs laws, that the proceeding is at *common law*. 8 Wheat. 391.

"When a seizure is made on land, the suit, though in the form of a title of information, is an action at common law." *Morris v. United States*, 8 Wall. 507.

This being a common-law action, no judgment for costs could be rendered against the property or the claimant for costs in this action, as there was no judgment of forfeiture in the case. See, also, U. S. Rev. Stats., secs. 938 and 970.

O. T. Rouse, United States District Attorney, for Appellee.

PER CURIAM.—The United States marshal seized one hundred and fifty head of cattle and fifty-two calves.

The finding of the court was that fifty head of the cattle

were imported from the republic of Mexico and were dutiable, and that said fifty head of cattle were mixed with others. The court further found that the claimant, H. K. Hildebrandt, did not import the said fifty head of cattle with intent to violate the customs law of the United States.

The supplement to the Revised Statutes of the United States provides that in all actions to enforce a forfeiture of goods, wares, or merchandise where an issue of fact shall be found, the court shall find as a distinct and separate finding whether the alleged acts were done with an actual intent to defraud the United States, and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed. 18 U. S. Stats. at Large, 188, 189, sec. 16. [Repealed, U. S. Supp. Rev. Stats. 1891, 755, sec. 29.]

The claimant moved to retax the costs in this action as the same appears in the memorandum of costs, and to strike out from said memorandum of the costs the sum of \$878.62, charged as marshal's fees, filed herein by plaintiff, on the ground that no part of said costs were made by claimant, and therefore are not chargeable to him, and on the further ground that only \$98.12 thereof are court costs.

The motion was denied by the court, which we conceive to be error.

The supreme court of the United States has held that in cases of seizure of goods for violation of the customs laws that the proceeding is at common law.

In the trials of all cases of seizures on land the court sits as a court of common law. *The Sarah*, 8 Wheat. 391; *Morris v. United States*, 8 Wall. 507.

In actions at law it is a general rule that the losing parties are to pay the costs. *Dittludge v. Ruce*, 92 U. S. 116.

We think that only in cases of a payment or forfeiture is the claimant or property seized liable for costs of same. Only costs of the trial should have been taxed against the appellant. The motion of claimant to retax costs should have been allowed. The judgment for costs is hereby reversed so as to retax the costs.

# MEMORANDUM DECISIONS.

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[Civil No. 261.]

**CHARLES W. BEACH**, Appellee, v. **FREDERICK GAINS**,  
Appellant.

**APPEAL** from the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge.

Harris Baldwin, for Appellant.

Herndon & Hawkins, and E. M. Sanford, for Appellee.

January 19, 1889. Affirmed.

(Note by Reporter.—The record shows, "Opinion filed," but none appears in the records of the office of the clerk of the supreme court.)

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[Civil No. 244.]

**P. W. STRAHAN**, Appellee, v. **J. R. KILPATRICK**,  
Appellant.

**APPEAL** from the District Court of the Third Judicial District in and for the County of Yavapai. William W. Porter, Judge.

E. M. Sanford, for Appellant.

Rush & Wells, and Wilson & Norris, for Appellee.

January 25, 1889. Affirmed.

(Note by Reporter.—The record shows, "Opinion filed," but none appears in the records of the office of the clerk of the supreme court.)

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[Civil No. 246.]

C. S. CLARK, Appellant, v. JAMES REILLY, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

Geo. G. Berry, for Appellant.

James Reilly, for Appellee.

February 11, 1889. Affirmed.

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[Civil No. 246½.]

ANDREW GARRETT et al., Appellants, v. DANIEL  
CLEARY et al., Appellees.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. William H. Barnes, Judge.

Herring & Herring, for Appellants.

James Reilly, for Appellees.

February 11, 1889. Affirmed.

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[Civil No. 247.]

MOLLIE HERBERT, Appellee, v. PASQUAL NIGRO,  
Appellant.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

Herring & Herring, for Appellant.

James Reilly, for Appellee.

February 11, 1889. Affirmed.

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[Civil No. 267.]

**PATRICK BAMBRICK and CHAS. NAGLE**, Administrators, Appellees, v. **JAMES T. SIMMS**, Appellant.

**APPEAL** from the District Court of the Second Judicial District in and for the County of Maricopa.

**E. J. Edwards**, for Appellant.

**Wilbur F. Lunt**, for Appellees.

February 14, 1889. Affirmed.

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[Civil No. 258.]

**C. D. PUTNAM et al.**, Appellees, v. **MICHAEL KENNEDY**, Appellant.

**APPEAL** from the District Court of the Second Judicial District in and for the County of Pinal.

No appearances of record.

February 15, 1889. Affirmed.

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[Civil No. 268.]

**GERALDO BONELLAS**, Appellee, v. **DANIEL NOONAN** and wife, Appellants.

**APPEAL** from the District Court of the Second Judicial District in and for the County of Maricopa.

**Edwards & Chalmers**, for Appellants.

**Wilbur F. Lunt**, for Appellee.

February 16, 1889. Affirmed.

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[Civil No. 269.]

JOHN CLARK, Appellee, v. JOHN F. DAGGS et al.,  
Appellants.

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge.

W. L. Van Horn, and Harris Baldwin, for Appellants.

Wilson & Norris, and Herndon & Hawkins, for Appellee.

June 18, 1889. Affirmed.

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[Civil No. 265.]

F. C. HATCH, Appellant, v. J. L. GANT, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

E. J. Edwards, and Goodrich & Street, for Appellants.

H. B. Lighthizer, for Appellee.

April 8, 1889. Dismissed.

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[Criminal Nos. 48, 49, 50, 51, 52, 53, 54, 55, 56, and 57.]

UNITED STATES OF AMERICA, Respondent, v. CAP-  
TAIN JACK and other Indians, Appellants.

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge.

Owen T. Rouse, United States District Attorney, for the United States.

H. N. Alexander, and L. H. Chalmers, for Appellants.

PORTER, A. J.—On the authority of the matter of *habeas corpus* of Gon-shay-ee in the supreme court of the United States, 130 U. S. 343, 32 Law. Ed. 973, 9 Sup. Ct. Rep. 542, this case is reversed.

Barnes, A. J., concurs.

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF ARIZONA  
DURING THE YEAR 1890.

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[Criminal No. 59. Filed February 4, 1890.]

[32 Pac. 260.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.  
JAMES BRASH, Defendant and Appellant.**

- 1. CRIMINAL LAW—ARRAIGNMENT—NECESSITY FOR PLEA—JUDGMENT WITHOUT PLEA NULLITY.**—A defendant in a criminal case does not, by consenting to go to trial and remaining silent when the clerk states to the jury that the defendant pleaded "Not guilty," make such plea his own. He, never having had the statutory opportunity to plead, was under no obligation to plead. No plea having been entered, there was no issue, and the verdict and judgment are nullities.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. William H. Barnes, Judge. Reversed.

The facts are stated in the opinion.

Baker & Campbell, for Appellant.

Defendant was indicted for the crime of an aggravated assault. The crime charged is a felony. Pen. Code of Arizona, secs. 390-392.

An issue of fact arises upon a plea of not guilty. Pen. Code, sec. 1581.

Every plea must be *oral* and entered upon the minutes of the court. *People v. Johnson*, 47 Cal. 182; Pen. Code, sec. 1548.



The record before the court does not show that defendant pleaded to the indictment, but, as a matter of fact, shows that he *did not*. There was therefore no issue for the jury to try, and the verdict and judgment are nullities.

"The right of arraignment may in some cases be waived, but a plea is always essential. The court cannot supply an issue after verdict where there has been no plea, notwithstanding that defendant consented to go to trial." Wharton on Pleading and Practice, sec. 409; *Hoskins v. State*, 84 Ill. 87, 25 Am. Rep. 433; *Gould v. State*, 89 Ill. 216; *Douglass v. State*, 3 Wis. 820; *State v. Sanders*, 53 Mo. 321; *State v. Montgomery*, 63 Mo. 298; *People v. Gaines*, 52 Cal. 480; *People v. Corbett*, 28 Cal. 328; *Griggs v. People*, 31 Mich. 471; *Aylesworth v. People*, 85 Ill. 301; *Davis v. State*, 38 Wis. 487.

Clark Churchill, Attorney-General, for Respondent.

SLOAN, J.—The defendant was indicted at the October term, 1889, of the district court of Pinal County for the crime of an aggravated assault. At the same term defendant was tried under said indictment, and convicted of an assault. From the judgment entered thereon, and the order overruling his motion for a new trial defendant appeals.

The record in this case fails to show that any plea was ever made by the defendant or entered by the court. It is suggested by the attorney-general that, in consenting to go to trial, and in remaining silent when the clerk in the usual form stated to the jury that the defendant pleaded "Not guilty" to the indictment, the defendant made the plea as thus stated by the clerk his own. To this it is sufficient to say that the statutory opportunity to plead having never been extended to the defendant, he was never under any obligation to plead. No plea having been entered by the defendant, there was no issue for the jury to try, and the verdict of the jury and judgment entered thereon are therefore nullities.

Judgment and order reversed, and cause remanded.

Wright, C. J., and Kibbey, J., concur.

[Civil No. 297. Filed March 24, 1890.]

[23 Pac. 680.]

GEORGE W. CHEYNEY, Petitioner, v. JOHN Y. T. SMITH, Respondent.

1. LEGISLATURES—LENGTH OF SESSIONS—REV. STATS. U. S. 1878, SEC. 1852, AS AMENDED DECEMBER 23, 1880, BY 1 SUPP. R. S. U. S., P. 313, BEING CH. 7, 46TH CONGRESS, 3D SESSION, PAR. 16, ORGANIC ACT, REV. STATS. ARIZ. 1901, CONSTRUED.—Statutes, *supra*, providing that "the sessions of the legislative assemblies of the several territories of the United States shall be limited to sixty days' duration," is mandatory and means a session of sixty legislative or working days, exclusive of Sundays, public holidays, and days of intermediate adjournment, not sixty consecutive days.
2. ORGANIC ACT—RELATION TO GOVERNMENT—CONSTRUCTION.—The organic law of the territory bears the same relation to the government of the territory as the constitution of a state sustains to the people of the state. The same rules of construction apply to it as to a state constitution.
3. STATUTES—CONSTRUCTION—LEGISLATIVE.—The contemporaneous construction of a constitutional provision put upon it by the authority for whose guidance it was intended, particularly if acquiesced in for a long term of years, should be followed by the courts.
4. SAME—CONSTITUTIONALITY PRESUMED.—A legislative act will be presumed constitutional till the contrary clearly appears.  
WRIGHT, C. J., dissents.

ORIGINAL Application for Writ of Mandamus.

The facts are stated in the opinion.

C. F. Ainsworth, for Petitioner.

Clark Churchill, Attorney-General, for Respondent.

Ben Goodrich, *amicus curiæ*.

SLOAN, J.—The plaintiff herein applies to this court for a peremptory writ of *mandamus* to compel the defendant, as territorial treasurer, to pay the amount of a certain warrant drawn by the territorial auditor in favor of plaintiff, as authorized by subdivision 15 of section 1 of an act commonly known

as the "Appropriation Bill," passed by the fifteenth legislative assembly, and approved by the governor on the tenth day of April, 1889. This action is brought for the purpose of having a judicial determination as to the validity of said act, it being contended that at the date of the passage and approval thereof the fifteenth legislative assembly had no legal existence, for the reason that the limit of time within which it could by the organic law lawfully remain in session had expired, and therefore it had become at said date *functus officio*. The journals show that the fifteenth legislative assembly began its session on the twenty-first day of January, 1889, and adjourned *sine die* upon the tenth day of April, 1889, being the date of the approval of said act. The journals further show that the assembly was in actual session but forty-eight working or legislative days, the last day being denominated the forty-eighth day of the session. The restriction upon the length of the sessions of the legislative assembly is found in section 1852 of the Revised Statutes of the United States, as amended December 23, 1880. Said section, as amended, reads as follows: "The sessions of the legislative assemblies of the several territories of the United States shall be limited to sixty days' duration." Said section being in its terms mandatory, must be so construed. It therefore remains for us to determine which of the two views as to the proper construction to be placed upon said section contended for at the hearing of the case we should adopt, viz., upon the one hand that the session of the legislative assembly is limited therein to sixty consecutive days from the day upon which the assembly convenes; or, upon the other hand, that the session is limited to sixty legislative or working days, exclusive of Sundays, public holidays, and days of intermediate adjournment. After the careful consideration the great public interests involved in this controversy demand, we have arrived at the conclusion that the latter view must prevail.

Said section is part of the organic law of the territory. It is proper to consider, therefore, the relation which the organic act, and other acts of Congress amendatory or supplementary thereto, bear to the government of the territory. It was argued at the hearing of this case that Congress had granted to the legislature of a territory certain limited powers, and

restricted their exercise to the particular mode and manner expressed in its grant; that this grant is in every instance to be strictly construed; and that, the legislature having acted in a particular manner, no inference is to be drawn therefrom that it has theretofore acted within the limit of its delegated powers. We think the true view is that the organic law of a territory bears the same relation to the government of the territory as the constitution of a state sustains to the people of the state. The supreme court in *National Bank v. County of Yankton*, 101 U. S. 129, say: "The organic law of the territory takes the place of the constitution as the fundamental law of the local government." If the view we have given be correct, then it follows that the same rules of construction apply, and like effect must be given to any part of the organic law as would apply and be given to a similar provision in the constitution of a state. A well-established rule is that the contemporaneous construction of a constitutional provision put upon it by the authority for whose guidance it was intended, particularly if acquiesced in for a long term of years, should be followed by the courts. See *United States v. State Bank*, 6 Pet. 39; *Caldwell v. Carrington*, 9 Pet. 103; *Edwards v. Darby*, 12 Wheat. 206. That this rule applies to the construction of the organic acts of the territories is asserted by Chief Justice Chase in the case of *Clinton v. Englebrecht*, 13 Wall. 434. In speaking of the power of the legislature of Utah to legislate with reference to the practice of the courts in the matter of juries, he said: "This uniformity of construction by so many territorial legislatures of the organic acts, in relation to their legislative authority, especially when taken in connection with the fact that none of these jury laws have been disapproved by Congress, though any of them would be annulled by such disapproval, confirms the opinion warranted by the plain language of the organic act itself, that the whole subject-matter of jurors in the territories is committed to territorial regulation." A provision in the organic law of New Mexico, which by the act organizing the territory of Arizona was made applicable to the latter, was to the effect that no session of the legislative assembly could exceed the term of forty days. The first legislative assembly of the new territory convened, by proclama-

tion of Governor Goodwin, on the twenty-sixth day of September, and remained in session until the tenth day of November, 1864, a total of forty-six consecutive days. Deducting ten Sundays that intervened between the day upon which the assembly first met and the day upon which it finally adjourned, and we find that it was in session forty working or legislative days. After forty consecutive days had expired, the more important acts of the session were passed; among them being what was known as the "Howell Code." Under the provisions of this code of laws, the government of the territory was for the most part administered until it was superseded by the code of 1887. The validity of these laws was never questioned, and the courts, as well as subsequent legislatures, recognized them as equally operative and binding with the other acts of this session. If it be contended that the act of 1880, amending section 1852 of the Revised Statutes is to be construed differently from the provisions of the organic act of New Mexico on the same subject, and that legislative construction upon the latter provision cannot, therefore, be considered, we find that the first legislative assembly to meet after said act took effect, viz., the eleventh legislative assembly, convened upon the third day of January, 1881, and finally adjourned upon the twelfth day of March following, a total of sixty-nine consecutive days. Deducting, as before, the intervening Sundays, and we find that the assembly was in actual session upon sixty working or legislative days. Sixty consecutive days from the beginning of the session ended with March 3d. After said date an act was passed fixing the date for the convening of subsequent legislatures. This act was followed and acquiesced in by succeeding assemblies, until the act of 1887 again changed the date of the beginning of the sessions. Among other acts was one creating the county of Graham: another, providing for the issue of bonds and the levy and collection of taxes; others were passed amending the revenue laws and the statute of limitations. During the session the council directly gave its assent to this legislative construction in rejecting a resolution to adjourn at the end of the sixty consecutive days. Thus the legislative construction from the beginning has been uniform that the sessions are limited to sixty days of actual

session. In the case of *Moog v. Randolph*, 77 Ala. 608, the supreme court of Alabama distinctly recognized the rule that the practical construction of the legislature will govern in a case of this kind, and gave a like construction upon the term "days," in a similar provision of the constitution of that state.

In construing the constitutional provision that the general assembly shall not remain in session longer than fifty days, Justice Somerville in that case said: "I am satisfied that 'fifty days' means fifty legislative working days, exclusive of the Sundays and other days upon which the senate and house concur in refusing to sit by joint resolutions of adjournment. This question has been repeatedly considered by the judiciary committees of the senate and house of representatives at successive sessions of the general assembly since the adoption of the constitution; and other reports concurring in this view have in each instance been adopted by those bodies. Even if we regard the question a doubtful one, we would hesitate to depart from this settled legislative construction of the fundamental law, especially in view of the serious consequences which would necessarily flow from it."

But, aside from the legislative construction, we think a consideration of the subject-matter, as well as the evident purpose and intent of the act of 1880, warrants the interpretation we put upon it. Congress certainly contemplated that emergencies might arise that would render legislation between fixed dates practically impossible. At any rate, that upon Sundays and holidays no legislation could or would be done. If the purpose was to include these, other language more clearly expressing this intent would very probably have been used. A distinction should be made between statutes which restrict the number of days upon which acts may be performed and those which merely fix the ulterior limit of time within which a single matter may be transacted. In the former, Sundays and other days when labor or business cannot be transacted are usually excluded; in the latter, these are usually included, unless expressly excepted. Thus it has been held that Sundays, not being judicial days, are not to be considered as days of a term of court. *Read's case*, 22

Gratt. 924; *Bank v. Williams*, 46 Mo. 17; *Chicago v. Iron Works*, 93 Ill. 223. There appears no good reason why the same rule should not apply to the construction of the term "days," when applied to matters to be transacted by legislative assemblies.

Were we in doubt as to the correctness of the above construction, what would be the duty of the court in the premises? The legislative assembly, a co-ordinate branch of the government of the territory, acting under like solemn obligations and responsibilities with ourselves, has passed the act, the validity of which is in question, which act has been approved by the governor, who has taken a like oath to support the constitution and laws of Congress, and now are we to declare it invalid? If we believe that the legislature, in attempting to legislate after March 21st, clearly, palpably, and plainly violated the fundamental law of the territory, then most unquestionably it is our duty to so declare. While this is true, we must bear in mind that among the fundamentals of the law almost, is the proposition that "we can declare an act of assembly void only when it violates the constitution (or organic law) clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds." *Sharpless v. Mayor etc.*, 21 Pa. St. 164, 59 Am. Dec. 759. In *Adams v. Howe*, 14 Mass. 345, 7 Am. Dec. 216, the court say: "We must premise that so much respect is due to any legislative act solemnly passed and admitted into the statute-book that a court of law which may be called upon to decide its validity will presume it to be constitutional until the contrary clearly appears, so that in any case of the kind substantially doubtful the law would have its force. The legislature is in the first instance the judge of its own constitutional powers, and it is only when manifest assumption of authority or misapprehension of it shall appear that the judicial power will refuse to execute it." In Kentucky it has been held that if it be doubtful or questionable whether the legislature has exceeded its limits the judiciary cannot interfere, though it may not be satisfied that the act is constitutional. *City of Louisville v. Hyatt*, 2 B. Mon. 178, 36 Am. Dec. 594. To the same effect, among others, are the following cases: *City of Lexington v. McGuillan's Heirs*, 9 Dana,

514, 35 Am. Dec. 159; *Cooper v. Telfair*, 4 Dall. 14; *Tyler v. People*, 8 Mich. 333; *State v. Cummings*, 36 Mo. 277.

In view of this well-settled rule recognized in the foregoing cases, apart from the view we take of the organic law,—viz., that the legislature is limited in its sessions to sixty working or legislative days, and not to sixty consecutive days, as contended,—we would hesitate before holding that the legislature had in this instance transcended its powers, and violated the fundamental law of the territory, especially when we consider that this, in effect, would be to annul many of the laws now in force, and thus disturb and unsettle the public credit, destroy private rights, and bring disaster upon the territory. From the foregoing considerations, we hold that, the appropriation bill passed by the fifteenth legislative assembly, and approved April 10, 1889, is a valid law, and that the plaintiff is entitled to his writ. The writ will issue.

Kibbey, J., concurs.

WRIGHT, C. J., dissenting.—The court, in the majority opinion, rightly hold that section 1852 of the United States Revised Statutes, as amended, is mandatory in its terms; but the opinion holds that, when Congress said in said section that the sessions of the said legislative assemblies of the various territories should “be limited to sixty days’ duration,” it meant sixty legislative working days, and not sixty consecutive days. We are unable to concur in this view; and we now proceed to analyze this section, and endeavor to show that the language employed by Congress necessarily limits sessions of territorial legislative assemblies to sixty consecutive days; and therefore that the fifteenth legislative assembly of this territory, having begun its session on the twenty-first day of January, 1889, was not, and could not have been, without permission of Congress, in legal session on the tenth day of April, 1889. There is no dispute as to the facts. The said fifteenth legislative assembly having begun its regular session at the time fixed by law, viz., on the twenty-first day of January, 1889, sixty consecutive days from that date expired on the twenty-first day of March, 1889; and it is admitted that the act in question was passed on the tenth day of



April, 1889. So that the only and vital question is, was said assembly in legal session on the said tenth day of April, 1889? Clearly, it was not. That assembly was wholly and simply a creature of the national legislature. It was the nursling of Congress, drawing the milk of its existence from Congressional maternity, and living, moving, and having its being in the will of Congress, as expressed in the federal statutes. It therefore had no real legal being outside of those statutes. Necessarily it existed, if at all, according to their provisions. To those statutes, then, to the expressed will of Congress, the creator, must we look for the definition of the rights and powers of the creature. The section of the federal statute containing the principal and expressed limitation upon the duration of the sessions of territorial legislative assemblies is, of course, said section 1852, as amended in 1880. There are other sections of that statute, however, which shed light upon the true meaning of this one. The purpose, the intention, of the law-maker is of the first importance. We shall have obtained a true solution of the main question involved in this case, when we determine correctly, if we may be able to do so, precisely what congress meant by the language it employed in this section. It reads: "The sessions of the legislative assemblies of the several territories of the United States shall be limited to sixty days' duration." Is the latter clause mandatory or directory? The court incidentally say it is mandatory in its terms, but the conclusion arrived at indicates that a discretion is implied. We are unable to perceive how this can be; because, if the meaning of this language is clear and indubitable and is mandatory, it admits of but one true construction, being susceptible of but one true meaning. Yet the court say: "It remains for us to determine which of the two views, as to the proper construction to be placed upon said section, contended for at the hearing of the case, we should adopt, viz.: Upon the one hand, that the session of the legislative assembly is limited therein to sixty consecutive days from the day upon which the assembly convenes; or, upon the other hand, that the session is limited to sixty legislative or working days, exclusive of Sundays, public holidays, and days of intermediate adjournment."

The decision then construes the language to mean sixty

legislative working days, exclusive of Sundays, holidays, and days of intermediate adjournment. It seems to us that, if this construction is correct, it makes the language necessarily directory, and not mandatory; for the reason that sixty legislative working days, exclusive of Sundays, holidays, and days of intermediate adjournment, would necessarily make the session endure longer than sixty consecutive days; and therefore, as the greater includes the less, while the session might endure for seventy or eighty consecutive days, counting Sundays and other days of intermediate adjournment, in order to consume sixty legislative working days the limitation might also be construed to mean sixty consecutive days. In other words, the real point of difference is, plaintiff's counsel contend, that the above language is directory only, and admits of discretion, while the defendant's counsel, and the friend of the court, contend that it is mandatory, and admits of no discretion. For it is here to be observed that the most earnest and strenuous arguments of plaintiff's learned counsel, including the very able argument of Assistant United States Attorney-General Shields, filed herein, were that the said language is directory only. So that it seems to us to be primarily essential to a satisfactory solution of the problem in hand to first determine absolutely, if possible, whether this language is mandatory, or directory only.

Now, at the outset, we say this language is so clearly mandatory that it is really surprising that any one should question its true import. It might be observed that no mandatory phrase or sentence was ever employed that was not also, in a measure at least, directory. When God said, "Let there be light," He both directed and commanded, and the glory and blessing of that subtle agent covered the void earth. If the teacher says to the pupil, "Get your lesson," it is both a direction and command. If the father says to the son, "Go to the stable and bring my horse, by the back gate, into the yard," the language is also a direction and command; but if the son should bring the horse into the yard by the front, instead of the back, gate, we apprehend there would still be a substantial execution of the power or authority conferred. We mean there is quite a difference between the power conferred and the exercise of that power. The grant of power

is generally mandatory, while the phraseology indicating the manner of its exercise is often construed to be only directory, and therefore the irregular exercise of a power would not necessarily render the act performed void. We think most of the cases, where language apparently mandatory has been construed to be directory, will be found upon critical examination to be where there has been an irregular or improper exercise of the power granted, rather than the attempt to exercise a power not conferred. For instance, the election cases referred to by the learned counsel for the plaintiff. In the case at bar the power granted to the legislative assembly by Congress was to hold a biennial session for only sixty days, and the attempt to hold longer than sixty days was attempting to exercise a power not conferred. Mandatory language may be, and is often held to be, directory; directory language seldom is, and rarely is held to be, mandatory. The one is used generally in a permissive sense; the other, in a prohibitive or negative sense. "Thou mayst be saved" is permissive; "Thou shalt not kill" is prohibitive. The one imports discretion, the other does not. Mandatory language is generally that which superiors employ in addressing inferiors. It is generally used where the party using it has the power to control the action of the party to whom it is addressed. Hence the intention of the party using the language should control the construction put upon it, unless the language employed is so absurd or dubious in meaning as to render such intention absolutely uncertain and indefinite. It is the language of the parent to the child, of the teacher to the pupil, of the master to the servant, the principal to the agent. Now, Congress is the principal or master—the superior; the legislative assembly is the agent or servant—the inferior. It is for the principal or master—the superior—not only to direct, but to command; and it is for the agent or servant—the inferior—not only to follow, but to obey. Wherever Congress has intended to give this agent—this inferior—a discretion in action, its language is so clearly directory as not to admit of doubt. This, however, has rarely happened, and but few instances can be found, for now we assert that, with almost unbroken uniformity, wherever Congress, in legislating for the territories, has spoken with reference to the various powers, duties, ses-

sions, etc., of the territorial legislatures, it has used the word "shall" in not simply a directory, but in a mandatory, sense. Let us see: Section 1842 of the Revised Statutes of the United States says: "Every bill which has passed the legislative assembly of any territory shall, before it becomes a law, be presented to the governor," etc. Is this not plainly mandatory? Would any one pretend that, if the legislative assembly were to attempt to pass a law without presenting it to the governor, it would be worth the paper upon which it was written? Again, section 1846 of said statutes in its first sentence says: "The legislative power in each territory shall be vested in the governor and the legislative assembly." Can there be any discretion here? May the legislative power exist elsewhere? Further, we read in the same section: "The legislative assembly shall consist of a council and house of representatives. The members of both branches of the legislative assembly shall have the qualifications of voters as herein prescribed. They shall be chosen for the term of two years, and the sessions of the respective legislative assemblies shall be biennial. Each legislative assembly shall fix by law the day of the commencement of its regular sessions. The members of the council and of the house of representatives shall reside in the district or county for which they are respectively elected." Here we have the use of the word "shall" recurring seven different times in this one section; and all referring directly to the qualifications, powers, duties, sessions, etc., of the members of the territorial legislative assemblies; and is there any possible room for the faintest doubt that, in each instance, the word is used in its absolute, mandatory sense? It is not that the assembly may consist of a council and a house, but it shall so consist; not that the members of both branches may have the qualifications of voters, etc., but they shall have such qualifications; not that they may be chosen for two years, but they shall be; not that the sessions may be biennial, but that they shall be; not that each legislative assembly may fix by law the day of the commencement of its regular sessions, but it shall fix the day; not that the members may reside in their respective districts or counties, but they shall reside therein. Again, the latter part of section 1886 of the Revised Statutes of the United States reads:

"No session of the legislature of a territory shall be held until the appropriation for its expenses has been made." Does this mean that such session may be held, whether the appropriation be made or not? On the other hand, is not the inference irresistible that, unless such appropriation were first made, such session would be void? In other words, is not the appropriation a condition precedent to the legal existence of the session? And still again, section 1888 of said statutes reads: "No legislative assembly of a territory shall, in any instance, or under any pretext, exceed the amount appropriated by Congress for its annual expenses." Here, again, Congress has clearly indicated its purpose to be to limit the sessions of the legislative assemblies to a definite period of sixty days' duration; for appropriations are made upon a basis of sixty days; and we know of no instance where the *per diem* of members, or expenses incurred for longer periods than sixty days, have been paid. This section, then, sheds light upon the meaning of Congress, when it employed the language, "shall be limited to sixty days' duration," and we think it, and other instances referred to, clearly indicates the legislative intent; that Congress said just what it meant, and meant just what it said, when it declared, in plain, unambiguous language, that the sessions of the legislative assemblies of the several territories of the United States shall be limited to sixty days' duration.

If it had been the intention of Congress to rest any discretion; if its purpose had been that the session might be indefinite in duration, but that Congress would only pay for sixty days of it,—would not the language of the statute have been something like this: "The sessions of the territorial legislative assemblies may continue longer, but in no event will the United States pay the expenses thereof for more than sixty days?" And is it not in a measure a reflection upon the wisdom and intelligence of the federal law-makers to impute a doubt to the meaning of the simple, but significant, language they employed? Congress was passing a fundamental law for the guidance of one of the three co-ordinate branches of youthful governments, whose people, being of the frontier in a large measure, were not supposed to be so critical in their civilization and learning as in the older commun-

ities. Is it reasonable to suppose that Congress, in passing this fundamental law, which in its operation was to so seriously affect the people in these frontier governments, would use language of intricate, doubtful, ambiguous, or double meaning? Rather, is it not most reasonable to suppose that Congress intended to use language of the simplest, most certain, and unequivocal meaning? And is this not exactly what Congress has done? Is there any possible room for construction in determining the true meaning of the phrase, "Shall be limited to sixty days' duration?" Is it not, therefore, clear and certain, beyond reasonable doubt, that Congress intended to use the above language, not simply in a directory, but in a mandatory, sense? It will be observed that there are two words in this phrase which are controlling, and which make its meaning absolute,—viz., the words "limited" and "duration." The word "limited" means narrow, restricted. It is synonymous with the word "circumscribe"; and that word means to inclose within a certain limit; to hem in; to confine; to bound; to limit; to restrict, etc. Mr. Webster defines the word "duration" to mean the power of enduring; continuance in time; "the portion of time during which anything exists." Adding the latter definition of the word "duration" to the phrase, it then would read: "Shall be limited to an existence of sixty days." Is it not evident that the great primal purpose of Congress was to control within fixed, definite limits the sphere of legislative action in these territories? And that when the session began it should continue to exist, to endure, for only sixty days from the day of beginning? Is there any room for construction here? Or, rather, can there be but one true construction? Is the true meaning of this section at all doubtful? Does it not necessarily mean that, whatever the time fixed by the legislative assembly for the session to begin, it could not continue to exist, as a legal organized body, longer than sixty days from said beginning? Sixty days of lawful session; sixty days of legal, organized existence, that is all. It means sixty days, counting one after another, including Sundays, holidays, and any days of temporary adjournment. If Congress had meant to exclude these days from the limit of sixty days' duration, it would have said so. How plain the language; how simple, how certain

the meaning. Although adjournments are had, the sessions go on. This is fundamental. Mr. Blackstone says: "An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies." 1 Blackstone's Commentaries, 186. If Sundays, days of temporary adjournment, etc., were not to be counted as days of the session, then for those days the session would not endure. Is it not plain that, if Sundays, holidays, and all other days of temporary adjournment are not to be counted as parts of the session, the legislature would not be in session during such days, and that it would necessarily have to possess the power to hold any number of distinct sessions? But Congress has only conferred power to hold one session, of sixty days' duration. How, then, can it hold more than one session? Again, to state it a little differently, if Sundays, days of intermediate adjournment, etc., are not included as parts and parcels of the session, the time measured by these days being no part of such session, the session necessarily ceases for that time; but the only and true meaning of the language used by Congress is that, when the session begins, it endures, continues to exist, for sixty days only from said beginning. So that it is simply impossible that there could be but one regular, legal session of the territorial legislative assembly; and it is just as impossible that that session could legally exist, endure, for a period longer than sixty days from its beginning.

Another, and we think a potent, reason why Congress intended by the language used to limit the duration of the session of the legislative assembly to sixty days from its beginning is, that the history of the times, at and recently before the passage of the act, was rife with complaints of extravagance and reckless expenditure in more than one of these legislative assemblies; so that, construing this statute in the light of surrounding circumstances and contemporaneous history, we say that it is evident that the purpose of Congress was to absolutely control, to circumscribe, to hem in, to restrict within fixed definite limits, these legislative assemblies as to the period of their existence; and to fix beyond the line of cavil or discussion the fact that the session could only exist, endure, for sixty days from its beginning. Hence the days of its possible existence were with unerring certainty num-

bered. By the volition of the members of the legislative assembly its session might die before the expiration of the full number of days; but, at all events, it could not live, endure, beyond them. The measure of its existence, the day, the hour, of dissolution, was marked upon the dial-plate in unmistakable phrase. Hence we say again that Congress not only used the language of said section in a directory, but more emphatically in a mandatory sense. To us the language used imports no possible discretion as to the limitation of the period beyond which the session cannot exist. It has but one true meaning. It means the actual hours, days, weeks, etc., elapsing—the one after the other—from the time of the beginning of the session till sixty days, of twenty-four hours each, have passed. For obvious reasons, the time of beginning was immaterial; but, for equally obvious reasons, the time of ending was material. Congress had to pay the bills of expense, which could not be affected by the beginning of these sessions, but would necessarily be seriously affected by their endings,—by the periods of their duration. While, therefore, it is evident that a discretion was intended as to the time of their beginning, it is equally evident that none was intended as to the time of their ending. The limit is fixed, definite, and certain. They may stop this side of the limit. They cannot go beyond it. It is not pretended that the legislative assembly had any inherent power to convene, call itself into legal session, after dissolution; and yet, as we have already seen, if this be not so, how can days of intermediate adjournment be excluded from the session, without the session itself becoming necessarily dissolved? And therefore the assembly would necessarily have to possess inherent power to call itself back into legal session. But the principle is quite a general one that no legislative bodies have this inherent power. When the legislatures of the states end their sessions, they can only reconvene by authority of the governor. When Congress adjourns, the President alone can call one or both branches of it back into legal session. And even the British parliament itself has no inherent power of convention after dissolution; the Queen may prorogue it, and it cannot of itself reconvene. So that, as the supreme court of Dakota says in *Treadway v. Schnauber*, "The territorial legislature is a creature of Congress.



Its powers, duties, and sessions are defined and limited by the act organizing the territory, and the amendments thereto, and it derives no life or power from any other source. It is authorized to hold a biennial session of not to exceed forty (now sixty) days, and there is no provision . . . to extend the session beyond the time specified." See 1 Dak. 249. The court seem to rely upon the decision of the supreme court of Alabama in *Moog v. Randolph*. See 77 Ala. 608. But it must be remembered that the limitation there referred to was upon the sessions of a state legislature, which had given repeated legislative constructions to the limitation contained in the constitution of Alabama, all to the effect that the fifty days' limitation meant fifty legislative working days; and that the court followed that construction—as Mr. Justice Somerville, who delivered the opinion of the court, said—because of the serious consequences that would ensue; the court holding that it would be reluctant to depart from such construction in doubtful cases, the question being no longer *res integra*.

We fully agree with the court, in the case at bar, that, where laws have long been acquiesced in,—where substantial rights have grown up and vested under them,—it is a well-settled policy of the courts not to disturb them, though they may not have been legal or constitutional originally. This was, as we have just seen, the true reason for the decision in the Alabama case; it was also the reason for the Oregon decision. But this doctrine cannot obtain here. The acts of the fifteenth legislative assembly, passed after the expiration of the sixty consecutive days from the beginning of its session, have not been acquiesced in. The validity of those acts has been questioned ever since their passage. The contention over them has superinduced the very litigation at bar. And because it is the policy of the courts not to disturb illegal or doubtful acts, long acquiesced in, for the reason that substantial rights have vested, and evil consequences might ensue, does it follow that the courts ought to uphold illegal or doubtful acts, because substantial rights might vest in the future? We are free to say that in our opinion the various laws, passed by the first and the eleventh legislative assemblies of this territory, after the expiration of sixty consecutive days from their beginning, should not be disturbed simply be-

cause they have been long acquiesced in. But should that view control the action of the court in the case at bar? If it should, then the courts could pass upon the validity of no legislation, because evil consequences might follow *in futuro*. The court is not called upon to give a construction retroactive in its effects, but to say whether or not we will truly decide a living vital issue. Nor will it do to say there has been a uniform legislative construction on this subject by our legislative assemblies. If the first and eleventh legislative assemblies of this territory construed the limitation to be sixty legislative working-days, presumably the other thirteen legislative assemblies of the territory construed it to mean sixty consecutive days; for we must infer that, if any of the remaining thirteen legislative assemblies had construed the limitation to be sixty legislative working days, this resource would have been drawn upon to strengthen the position taken. At all events, it is absolutely certain that a number of those assemblies did construe the limitation to be sixty consecutive days. And therefore the territorial legislative construction put upon the limitation lends neither force to the argument, nor strength to the position.

For the first time the supreme court of this territory is called upon to put its construction upon the purview of that limitation. That construction should be according to the true tenor and effect of the statute, unaffected by past illegal acts, acquiesced in, or rights to be hereafter affected under them. This is plainly so, for all legal questions and rights, arising under the acts of the fifteenth legislative assembly, passed after the expiration of the sixty consecutive days, are still *res integra*. But, even to the modified extent to which the Alabama case goes, it seems to stand alone. Every other state legislature, so far as we have been able to learn, whose sessions have been, or are, limited by their constitutions to a certain number of days, seems to have entertained no doubt that the limitation meant consecutive days. The constitution of Missouri (art. 4, sec. 16) provides that "the members of the general assembly shall severally receive from the public treasury such compensation for their services, as may, from time to time, be provided by law, not to exceed five dollars per day for the first seventy days of each session, and after that

not to exceed one dollar per day for the remainder of the session," etc. This constitution was adopted in 1875, and every general assembly of Missouri, that has held a legislative session since, has construed the seventy days' limitation to mean seventy consecutive days from the beginning of the session. Section 17 of article 5 of the constitution of the state of Arkansas, adopted in 1874, provides that "the regular biennial sessions [of the general assembly] shall not exceed sixty days in duration, unless by a vote of two thirds of the members elected to each house of said general assembly," etc. It will be observed that the words of limitation in this section are very similar in their import to the words of limitation upon the session of the territorial legislative assemblies, contained in section 1852 of the United States Revised Statutes as amended. The one says, "shall not exceed sixty days in duration," the other says, "shall be limited to sixty days' duration." Every general assembly of Arkansas that has held a session since the adoption of this constitution, has construed this limitation to mean sixty consecutive days. And in *Trammell v. Bradley*, 37 Ark. 374, the supreme court of that state has passed directly upon the meaning of this limitation; and they use this emphatic language: "The regular biennial session of the legislature had begun on the 10th of January, 1881. During the session by concurrent resolution, not signed by the governor, the session 'was extended and continued' until twelve o'clock m. on the nineteenth of March, 1881. The session, if not properly extended, expired on the ninth of March, and the act having been passed after that period, would be invalid." To say that the words, "shall not exceed sixty days in duration," are mandatory, and mean sixty consecutive days, including Sundays, holidays, and any days of intermediate adjournment, and that the words "shall be limited to sixty days' duration," are not mandatory, and mean sixty legislative, working days, is to make a judicial distinction without a judicial difference. And it must be further observed that, wherever the courts of last resort in the territories have incidentally passed upon this question, they have indicated their view to be that the limitation was intended to be sixty or other number of consecutive days; i. e. that when the session begins every day must be counted as a

part of the session, till the sixty or other number of days elapse. See *People v. Clayton*, 5 Utah, 598, 18 Pac. 628; *Territory v. Scott*, 3 Dak. 357, 20 N. W. 401; *Stevenson v. Moody*, 2 Idaho, 260, 12 Pac. 902; *Treadway v. Schnauber*, 1 Dak. 249, 46 N. W. 464. See, also, *State v. Arrington*, 18 Nev. 412, 4 Pac. 735; *National Bank v. County of Yankton*, 2 Dak. 365, 101 U. S. 129; and *Bank v. State of Iowa*, 12 How. 1.

But if the question were doubtful, if the courts had expressed or intimated views that are conflicting, we should unhesitatingly hold that the opinions of the attorney-general of the United States, delivered on the sixteenth days of March and July last, have put the question beyond the line of discussion. This is the great law officer of the government. In passing upon federal statutes, his opinions, next to the positive judicial determination by the great tribunal of final resort (the supreme court of the United States), are entitled to the highest consideration, and should have the binding force of exalted authority. In an official opinion rendered to the honorable the secretary of the interior, on the sixteenth day of July last, the Honorable W. H. H. Miller, attorney-general of the United States, referring to letters of the governor and secretary of Arizona, bearing dates of June 2d and 26th, respectively, said: "I am unable to find in either any question of law which is not covered by the opinions of this department rendered to you under dates of March 16, May 29, and June 19, 1889. The first of these opinions was to the effect that, under the act of Congress, which is the organic law of the territory, the session of the legislature of Arizona is limited to sixty consecutive days. The corollary to this conclusion seems clear, that any attempted legislation after that time would be nugatory." This language was uttered subsequently to the reception by the attorney-general of the "memorandum" of the assistant attorney-general, Shields, filed with the argument of the learned counsel for the plaintiff herein. This is apparent from the face of each. It must therefore be regarded as a reassertion and indorsement of the views expressed by the attorney-general in his opinion of March 16, 1889, on the same subject; and as already indicated, we regard these opinions by the attorney-general as

decisive of the main question involved in the case at bar. With the attorney-general, we hold that any attempted legislation, after the expiration of the sixty consecutive days, was nugatory. The fifteenth legislative assembly of this territory, having by operation of the law of its being been dissolved after the twenty-first day of March, 1889, on the tenth day of April, 1889, it had ceased to have a legal, organized existence, and could therefore pass no valid acts. Hence it is our conclusion that the prayer of the petition should be denied.

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[Civil No. 280. Filed April 18, 1890.]

[24 Pac. 184.]

THOMAS D. SATTERWHITE, Plaintiff and Appellant,  
v. WILLIAM MELCZER et al, Defendants and Appellees.

1. BANKS AND BANKING—CHECKS—REFUSAL TO PAY—NO LIABILITY TO HOLDER.—A bank is not liable to the holder of a check drawn by a general depositor for its refusal to pay the check, though it has sufficient funds of the drawer to pay the amount called for.
2. EXECUTIONS—TO WHOM DIRECTED—LAWS 1889, SEC. 2, P. 37, CONSTRUED—REV. STATS. ARIZ. 1887, PAR. 1895, REPEALED—REV. STATS. ARIZ. 1887, PAR. 512, CITED.—Statute, *supra*, provides that an execution must be directed to the sheriff of the county where it is served, and repeals the provision of the Revised Statutes of Arizona of 1887, *supra*, which permitted its direction to constables. The "other officer" referred to in the act of 1889 refers to the provision of paragraph 512 of the Revised Statutes of Arizona of 1887, which designates other officers who shall perform his duties in case of his disqualification.  
WRIGHT, C. J., dissenting.
3. SAME—LEVY—UPON MONEY—ACTS 1889, P. 39, SEC. 9, CLAUSE 2, CITED.—Under statute, *supra*, to make a valid levy upon money the officer must reduce it to possession.  
WRIGHT, C. J., dissenting.
4. SAME—SAME—RETURN—BINDING UPON JUDGMENT CREDITOR.—Where an officer has made return of an execution stating that he has levied upon money in the hands of a bank belonging to the judgment debtor, Wise, the fact that such bank was a simple debtor to Wise

and that he had no specific money in its hands as bailee cannot change the effect of the levy from one upon money to one upon a debt.

WRIGHT, C. J., dissenting.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Maxwell & Satterwhite, for Appellant.

No officer, except the one authorized by statute, can make a valid levy. The execution in this case could only be served and levied by the sheriff. The said levy was attempted to be made by a constable and was void.

It is true that the writ itself was directed to the "sheriff or any constable," but there was no statutory authority for the issuance of the writ. The Revised Statutes of 1887 (par. 1895) authorized the writ to be directed to a constable. But the execution was issued under the act of the last legislative assembly. (See Acts of 1889, p. 37.) Section 2 of that act provides that the clerk shall direct the execution to the sheriff. That section, supplemented by sections 7, 22, and 24 of the same act, shows conclusively not only that the law was changed, but that it was intentionally changed, so that the service of an execution issued by the clerk was restricted to the sheriff. Hence any act of the constable in the attempted levy of said execution was necessarily void. The execution might as well have been directed to any other officer, or to a private individual.

If anything was levied on under this execution, as claimed by respondent, it would come within the general designation of personal property. No levy of an execution can be made upon personal property without taking actual possession of it. This is settled by our statute, and by the decisions of all the states. Session Laws of 1889, p. 30, sec. 9; Rorer on Judicial Sales, sec. 1002, p. 329; 6 Wait's Actions and Defenses, 752; *Carey v. Bright*, 58 Pa. St. 84; *Westervelt v. Pickney*, 14 Wend. 123, 28 Am. Dec. 516; *Levi v. Shockley*, 29 Ga. 710; *Duncan's Appeal*, 37 Pa. St. 500; *Brown v. Lane*,

19 Tex. 203; *Leach v. Pine*, 41 Ill. 66, 89 Am. Dec. 375; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Logsdon v. Spivey*, 54 Ill. 104; *Osborn v. Cloud*, 23 Iowa, 108, 109, 92 Am. Dec. 413.

A general deposit of money in a bank is not subject to levy, because the depositor has no title to any specific pieces of money, but only a right to have an equal amount of money returned to him. 6 Wait's Actions and Defenses, 752; *Scott v. Smith*, 2 Kan. 438; *Carroll v. Cone*, 40 Barb. 220; Freeman on Executions, sec. 111, p. 197; *McMillan v. Richards*, 9 Cal. 366, 369, 418, 70 Am. Dec. 655, and note; *Doyle v. Sleeper*, 1 Dana, 531.

The right to seize and sell property on execution is co-extensive only with the power to take and deliver possession. *Campbell v. Leonard*, 11 Iowa, 495; *Osborn v. Cloud*, 23 Iowa, 109, 92 Am. Dec. 413.

The officer must have the goods or property in his view and power. He should enter the store and take actual possession. He must assert his title to the property under execution, and his acts must be such that except for the protection of the execution he would be a trespasser. 6 Wait's Actions and Defenses, 756, 757; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Green v. Burke*, 23 Wend. 490; *Westervelt v. Pickney*, 14 Wend. 123, 28 Am. Dec. 516; *Connah v. Hale*, 23 Wend. 462.

In all cases there must be something more than a mere pen-and-ink levy. It is not sufficient that the officer make an inventory of the property and indorse the levy upon the writ. He must go where the property is. He must be where he can exercise control over it. He must do some act by reason of which he could be successfully prosecuted as a trespasser if it were not for the protection afforded by the writ. Freeman on Executions, sec. 260, p. 413; *Goode v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309; *Westervelt v. Pickney*, 14 Wend. 123, 28 Am. Dec. 516; *Minor v. Herriford*, 25 Ill. 344; *Beekman v. Lansing*, 3 Wend. 450, 20 Am. Dec. 707; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Bryan v. Bridges*, 6 Tex. 141; *Logsdon v. Spivey*, 54 Ill. 104; *Smith v. Niles*, 20 Vt. 320, 49 Am. Dec. 782; *Allen v. McCalla*, 25 Iowa, 464, 96 Am. Dec. 56; *Sheffield v. Key*, 14 Ga. 528; *Crawford v. Newell*,

23 Iowa, 453; *Levy v. Shockley*, 29 Ga. 710; *Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 378; *Gates v. Flint*, 39 Miss. 408; *Watts v. Cleveland*, 3 E. D. Smith, 553; *Douglas v. Orr*, 58 Mo. 573.

To avoid the conclusion from the foregoing authorities, the appellant seeks to maintain that it was the debt due to Morgan R. Wise from said bank which the constable levied upon, and not the money which he had on deposit. The officer says in his return that he levied on money—\$1,233.91. This concludes the appellees from claiming that anything else was levied on. As to the party who procured the levy, the return of the officer is an absolute verity. *Freeman on Execution*, 364; *Hallowell v. Page*, 24 Mo. 590; *Allen v. Martin*, 10 Wend. 300, 25 Am. Dec. 564; *Bank v. Domigan*, 10 Ohio, 220; *Paxson's Appeal*, 49 Pa. St. 195; *Brown v. Kennedy*, 15 Wall. 597.

As long as the return remains in force, it is conclusive, either of its validity or invalidity. *Freeman on Executions*, 387, p. 653; *Willington v. Gale*, 13 Mass. 483; *Williams v. Amory*, 14 Mass. 28, 29.

The return cannot be supplemented or added to by parol evidence. *Freeman on Executions*, 365, p. 603.

The statutes of the territory provide for a levy on a debt by a garnishment proceeding, and in no other way.

The question as to whether or not the payee of a check can maintain an action on the check against the bank before the bank has accepted the check, does not arise in the case. The only person who could raise the question is the bank, and it has not done so.

Frank Hereford, for Appellees.

KIBBEY, J.—On the 24th of March, 1889, the appellees were copartners in the banking business at Nogales, Arizona, and had on general deposit, in the ordinary course of their business, \$1,233.91, the money of one Morgan R. Wise. On that day, James Speedy, a constable of district No. 18 of Pima County, had in his hands an execution issued on a judgment rendered in the district court of Pima County, in favor of J. C. Waterman, against F. M. Vernon, S. B. Wise, and Morgan R. Wise, for \$506, upon which there was due that



amount, and accrued interest and costs. On the 25th of March the constable, as he testifies, levied upon \$1,233.91 belonging to Morgan R. Wise, the same being held under an injunction issued out of the district court for Pima County; also notifying Melczer & Co. that, if that injunction was dissolved, that execution would hold good. This the constable says, in response to a question asked him to detail all the circumstances of the service of the execution, was all he did. The officer did not take possession of the money. The constable indorsed upon the execution his return, which is as follows: "I hereby certify that I received the within execution on the twenty-fourth day of March, 1889, and served the same on the twenty-fifth day of March, 1889, by levying upon \$1,233.91 in the hands of William Melczer & Co., at Nogales, Pima County, A. T., belonging to the within-named defendant, Morgan Wise; the above being amount under attachment and suit pending in district court, Pima County, A. T. [Signed] James Speedy, Constable, Precinct No. 18." The execution was dated 20th March, 1889, and was returnable within ninety days. Nothing more was done under the writ. On the seventh day of June, 1889, Morgan R. Wise signed and gave to the appellant a check upon appellees for \$642. On the 24th of June, 1889, the check was presented to appellees for payment, which was refused because of the levy, if levy it was, of the Waterman execution. Wise had at that time a credit of \$642 with Melczer & Co. On the 26th of June, 1889, appellant began suit against appellees for \$642. There was a trial by the court, and finding and judgment for the appellees.

This case presents some anomalous features. The complaint alleges that on the 24th of June, 1889, the appellees were indebted to appellants in the sum of \$642.50; that on said day said sum of money was on deposit in appellees' bank, subject to appellant's order, and was due the appellant, and unpaid; and that appellant on said day drew on appellees, and payment was refused. The complaint is insufficient to constitute a cause of action, upon the theory of plaintiff. The only legal inference to be drawn from it is that appellant had deposited \$642.50 with appellees, and that appellees refused to honor his check for that sum. But the facts disclosed upon the trial, and before stated, negative any such

inference. The trial proceeded upon the theory, without question, that appellant, as holder of a check drawn by Morgan R. Wise for \$642.50 upon appellees, had a cause of action against appellees for their failure to pay the check upon presentation. It is not pretended that appellees accepted the check, or did any act equivalent to an acceptance. A bank is not liable to the holder of a check drawn by a general depositor for its refusal to pay the check, though the bank has sufficient funds of the drawer to pay the amount called for. *Bank v. Millard*, 10 Wall. 152; *Bank v. Whitman*, 94 U. S. 343; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314, and numerous other cases. And especially would the bank be not liable for its refusal to pay the check under circumstances such as those that existed in this case, where it must determine between the rights of rival claimants. It is unnecessary for us to proceed further to consider the question raised and discussed by counsel in their briefs. Two points, however, we will notice, as they may again arise in subsequent proceedings. Appellant contends that the levy of the execution was insufficient—1. Because it was addressed to, and served by, an officer unauthorized thereto by law; and 2. That the money levied upon by the officer was not reduced to possession by him.

Section 2 of the Acts of 1889 (p. 37) prescribes specifically that the execution must be directed to the sheriff of the county where it is to be served. This repeals the provision in paragraph 1895 of the Revised Statutes of 1887 that the execution might be directed to the sheriff or any constable of the county. Appellees argue that the mention of the "sheriff or other officer" in other parts of the act of 1889 evinces the intention of the legislature not to repeal the provision in the Revised Statutes of 1887. The "other officer" referred to in the act of 1889, we think, refers to the provision of section 512 of the Revised Statutes of 1887, which designates other officers who shall perform the duties of sheriff in case of his disqualification by reason of interest. The attempted levy was insufficient. The money, to have constituted a valid levy, must have been reduced to possession by the officer. This is expressly required by statute. Clause 2, sec. 9, Acts 1889, p. 39. Appellees contend that the acts of the officer

constitute a levy upon a debt due Morgan R. Wise. We think clearly not. The fact that the bank was a simple debtor of Wise, and that Wise had no specific money in the hands of the bank as bailee, cannot now operate to give a different effect to the acts of the officer. It simply shows that the officer was mistaken either as to the facts, or in the matter of his duty.

There are other questions presented, but, for the reason first stated, the judgment must be affirmed; and it is so ordered.

Sloan, J., concurs.

WRIGHT, C. J., dissenting.—On the twentieth day of March, 1889, J. C. Waterman, obtained from the clerk's office of the district court of Pima County, Arizona, an execution against F. M. Vernon, S. B. Wise, and Morgan R. Wise, members of the firm of Vernon, Wise & Co. Said execution was directed to the sheriff or any constable of said county. Subsequently, and on the twenty-fifth day of March, one James Speedy, a constable, made a levy of said execution, and made thereon the following return: "Territory of Arizona, County of Pima—ss.: I hereby certify that I received the within execution on the 24th day of March, 1889, and served the same on the 25th day of March, 1889, by levying on \$1,233.91 in the hands of William Melczer & Company, at Nogales, Pima County, A. T., belonging to the within-named defendant, Morgan Wise; the above amount being under attachment, and suit pending in district court, Pima County, A. T. James Speedy, Constable, Precinct No. 18." On the seventh day of June following, the said Morgan R. Wise drew a check in favor of the appellant on Melczer & Co., for the sum of \$642, which was presented at their bank in Nogales for payment on the twenty-fourth day of June, 1889. Payment thereof was refused, however, by the appellees, on the ground that the amount due Wise in their bank had been levied upon by virtue of Waterman's execution. Now, it is not disputed that James Speedy was a constable in Pima County; but it is contended that, as such, under our execution law of 1889, he could not make a valid levy on an execution issued from the office of the clerk of the district court of that county, although the

execution was issued to the sheriff or any constable of the county. We do not think this position tenable. True, section 2 of the Execution Law of 1889 does provide that the writ of execution shall be in the name of the territory, shall be subscribed by the clerk, sealed with the seal of the court, be directed to the sheriff of the county where it is to be served, etc. The learned counsel for the appellant contend that this was clearly an intentional change of the law; the purpose of the legislature being to restrict the clerk to the sheriff only in issuing executions. But we think not. The whole act must be construed together, and, if possible, all the sections thereof be made to harmonize, and each be vital. Now, section 3 of the same act provides that "the execution may be made returnable, at any time not less than ten nor more than ninety days after its receipt by the sheriff or other officer to whom directed, to the clerk of the court issuing it. When the execution is returned the clerk must note on the judgment book the amount made by the officer," etc. Again, section 12 of said act provides that "the sheriff or other officer must execute the writ against the property of the judgment debtor," etc. "The judgment debtor may point out to the levying officer such property as he may wish to be levied upon; and, if the officer deems the same sufficient," etc. If the legislature had intended that the sheriff only could levy an execution issued by the clerk of a court of record, would they have used the phrase "or other officer"? To say that the clerk can issue his execution to none but the sheriff is to make this phrase utterly meaningless. Chapter 2 of the Revised Statutes of 1887 was not repealed by the Execution Law of 1889. By that chapter, constables are empowered, and it is thereby enjoined upon them as an imperative duty, to serve and return all process in their counties directed or delivered to them by the justice, or any other competent authority. Ordinarily the sheriff occupies about the same relation to the courts of record that the constable does to the justice of the peace courts. Ordinarily the clerk would direct his execution to the sheriff, and ordinarily the justice of the peace would issue his to the constable; but it does not follow that the one might not also be directed to the sheriff, and the other also to the constable, as well. It is the validity of the execution that lends force to the levy, rather than the

manner of making it. These statutes are held to be mostly directory. See *Blood v. Light*, 38 Cal. 649; *Smith v. Randall*, 6 Cal. 50; *Webber v. Cox*, 6 T. B. Mon. 110. Of course, we do not mean that the requirements of the law must not be substantially complied with. It is our opinion, however, that there was statutory authority for issuing the execution to the sheriff or constable, and that the constable was competent to make the levy.

In the next place, it is urged by the appellant that, as the ninety days had expired within which the execution had to be returned under the statute of 1889, it had become *functus officio* before appellant presented his check to the appellees' bank for payment, and that, as several months had elapsed after the return of said execution, without sale, before this cause was tried below, therefore, if there had ever been a valid levy on any property upon which said execution could have become a lien, it (the lien) would have expired by operation of law long before the trial. We are unable to concur in this view. In one sense, after the return-day of an execution, it does become *functus officio*,—i. e. the officer could not make a new levy under that writ, but otherwise the execution still has virtue; and though, if it ever had been, it would then cease to be a lien upon any property not levied on, still, if there had been a valid levy thereon, on property subject to execution, does not the lien created thereby continue vital notwithstanding the return-day may have elapsed, and the execution have been returned without sale? And is it not true that after the return-day of the execution the officer could proceed to enforce the levy made by virtue of it, by making a valid sale of the property levied on, even without the assistance of a *venditioni exponas*? From its frequency, it was once supposed that this writ was necessary to authorize the officer to make the sale, but such was not the case. Such a writ was never essential to empower the officer to make the sale. It was, and may now sometimes be, requisite to compel him to do so. There are many reasons that make this a salutary rule. Suppose the officer receives an execution, and, though he uses the utmost diligence, he is unable to find property subject to its levy until five days before the return-day thereof. He cannot sell without giving ten days' notice

of sale. He would therefore be compelled to return his execution without sale, although he had made a levy when the execution was vital. Will it be seriously contended that he could not still proceed, and make a valid sale, with or without a *venditioni exponas*?

Mr. Freeman, in his work on Executions, says: "Notwithstanding the return of the *fiery facias*, he [the officer] could sell the property levied on as well without as with a *venditioni exponas*. If he was willing to proceed, the issue of this writ was a clear superfluity." Sec. 58. And further the same learned author says: "The effect of a sale under a *venditioni exponas* is the same as though the sale had been made under the original writ before the return-day. The purchaser can obtain no better nor greater title than would have passed under the original writ; but, on the other hand, the lien of the original writ, and of the levy thereunder, continue under the *venditioni exponas*, and confer as ample a title as could have been transferred under and by virtue of the original liens." Sec. 60. "If a levy be made under an execution, the officer thereby obtains a special property in the goods levied upon. He may retain possession, and make a sale after the return-day of the writ." At common law a *fiery facias* was a lien upon the personal property of the defendant from the time of its teste. This rule was modified by statute 29 Car. II. c. 3. This statute made the execution a lien from the time it was delivered to the officer, and he was required to note on the writ the time of its reception. Our statute also contains this requirement; but perhaps there is no good reason therefor, as, under the laws of this territory, an execution is clearly no lien upon the personal property of the defendant until the time of the levy thereof. Indeed, it seems to us not quite accurate to say the execution is ever a lien. At least, it seems more logical to say that the function of an execution that has been levied upon personal property is to attach the lien of the judgment, upon which said execution is based, and without which it would have no virtue, to the property levied on. From the perishable and transitory nature of personal property, and other conditions attaching to it, the law contemplates that execution sales thereof be briefer and less formal than such sales of real estate; but there are many things that

operate to excuse delay, or at least that will prevent the defeat of the levy. Where an injunction is served after levy and before sale, even though much time might elapse before dissolution of the injunction, yet when dissolved the original writ and levy would hold, and defeat any intermediate adverse levies; or where a party asserting an adverse right to the property levied on commences legal proceedings so immediately after the lapse of the return-day of the writ as to preclude a sale, and in this manner places the property again *in custodia legis*. In the case at bar the return-day of the writ was on the twenty-fourth day of June, and the appellant commenced his suit on the 26th of June; and hence we do not think that the presentation of appellant's check at the bank of appellees the day after, nor the commencement of the suit two days after, the return-day of the execution, defeated the lien attaching by virtue of the levy thereon.

But the most earnest contention of appellant's learned counsel is that the levy herein was invalid because, being upon personal property, the same was not taken possession of by the officer levying. This was generally the common-law rule, but there are many exceptions and modifications innovated by statutes. Perhaps every state and territory in the Union has statutory provisions modifying this rule to a greater or less extent. Arizona has a statute of this kind; and we are quite willing to admit, after a careful examination, that it goes to the verge of extremity in authorizing the levy and sale of interests in personalty not in possession. Indeed, we think it goes further than any statute of the kind of which we have any knowledge, and yet we are not prepared to say it is not a wholesome and effective statute. It is far-reaching, and leads into some unbeaten tracks. It practically does away with the old mode of garnishment proceedings after judgment. Counsel say that the deposit of money by Wise in appellees' bank made them simply his debtor, and that the only way the debt thereby created could be reached was by garnishment proceedings. The statute of 1889 imports quite the contrary. Section 3 of that statute says: "Debts and credits, choses in action, and all other property, both real and personal, or any interests, legal or equitable, in either real or personal property not capable of manual delivery, may be levied upon and

sold under execution." Subdivision 2 of section 9 of said statute then provides that a levy upon the interest of the defendant in personal property to which he is not entitled to the possession is made by giving notice thereof to the person entitled to the possession, etc. Then section 18 provides that "the officer making sale of any personal property not capable of manual delivery shall execute and deliver to the purchaser a certificate of sale, which certificate shall convey to such purchaser all the right which the debtor had in such property on the day the execution was levied." Why is this not preferable to the old mode of garnishment proceedings after judgment, in reaching a debt due the defendant? It is certainly more speedy, direct, and less expensive. Besides, it has a lien more effectual and immediate. At all events, it is the law of this territory. Again counsel say: "There is but one way that a debt can be levied upon and taken for the satisfaction of a judgment, and that is by garnishment proceedings." But we have seen that our statute says there is another way,—by levying an execution upon the debt, selling it, and executing to the purchaser a certificate of the sale; and the statute says this certificate of sale conveys to the purchaser all the interest of the defendant in the debt. Suppose in this case there had been a sale; that A had been the purchaser, and the officer had delivered to him the certificate of sale. Would not said certificate, by force of this statute, have subrogated him to all the rights and interests of Wise in the debt thus levied on and sold? And would not the same results follow if the sale should hereafter be made?

But there is another mode provided by statute for taking a debt in satisfaction of a judgment. This is found in paragraph 1950 of the Revised Statutes, (Execution Law of 1887, section 70,) which is not in conflict with the law of 1889; and it was not, therefore, repealed by it. That paragraph reads: "After the issuing of an execution, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount paid." And the concluding paragraphs of that statute provide still another mode of taking a debt in satisfaction of a judgment, viz., where, after the



issuing or return of an execution, the judge is satisfied that any person is indebted to the judgment debtor in an amount exceeding fifty dollars, he (the judge) may require such person to answer concerning the same, and then may order the amount found due the judgment debtor to be applied in satisfaction of the judgment. And it is to be observed that, after the return of the execution by the constable in the case at bar, the appellees filed their answer in court, admitting they had in their hands six hundred and forty-two dollars of money belonging to Morgan R. Wise, that the same had been levied on an execution against Wise, and that they had paid the same into court, and asked to be discharged, etc.

Something has been said about the return of the constable on the execution showing that it was money, and not a debt, that was levied upon; but we think the language of that return makes the legal inference inevitable that it was simply a debt due to Wise upon which the officer made his levy. He levied upon a debt due to Wise which had accrued by virtue of a deposit made by him in appellees' bank. That deposit created a debt, and nothing more. The return says the constable levied upon so much money in the hands of appellees belonging to Morgan R. Wise. The return may be inartistic, and may not very accurately express the facts as to what the officer did; but in this regard the return could be amended at any time. The law will not allow a mere defective return, made by an officer unskilled in technical forms, to inure to the disadvantage of a plaintiff in an execution. We think, however, the return is in substance sufficient, its import being apparent. We are certain the facts are. The appellant ought not, therefore, to complain.

We are satisfied that substantial justice was done in this case. True, the record would seem to indicate that Morgan R. Wise was quite heavily indebted to appellant; and we infer from this record that Mr. Wise possessed the virtue of being quite liberal in the allowance and payment of attorney's fees, for the record also shows that appellant had received considerably over four thousand dollars that large indebtedness from the bank of appellees on checks drawn in his favor by said Wise. It was only the last check drawn by Wise in favor of appellant that appellees

refused to pay, and this for the reason that what was due Wise from them then had been levied on the execution in favor of Waterman. This was a legal excuse, as we think that levy was valid. Let the judgment be affirmed.

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[Civil No. 262. Filed April 18, 1890.]

[24 Pac. 257.]

ISAAC B. HAND, Plaintiff and Appellee, v. WILLIAM M. RUFF, Defendant and Appellant.

1. **APPEAL AND ERROR—MOTION FOR NEW TRIAL—MUST BE DETERMINED DURING TERM WHEN MADE**—PAR. 837, REV. STATS. ARIZ. 1887, CITED AND HELD MANDATORY.—Statute, *supra*, is mandatory and requires that a motion for new trial be determined at the term when the motion is made. If not it is discharged by operation of law at the end of the term.
2. **SAME—JURISDICTION—NOTICE OF APPEAL—BOND—DISMISSAL FOR WANT OF JURISDICTION.**—Notice of appeal must be given during the term and the bond on appeal must be filed within twenty days after the term at which final judgment is rendered to give this court jurisdiction. Where failure to comply with these requirements appears of record the appeal must be dismissed for want of jurisdiction.

**APPEAL** from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge. Dismissed.

The facts are stated in the opinion.

Goodrich & Street, for Appellant.

Baker & Campbell, for Appellee.

SLOAN, J.—This cause was tried at the May, 1888, term of the district court of Maricopa County. The judgment was entered on the fourteenth day of June, 1888. The first Monday in November following was the day fixed by law for the beginning of the succeeding term of said court. There is a minute entry of the clerk in the transcript show-

ing that a motion for a new trial in this case, submitted at the May term, was overruled by the court on the third day of December, 1888, and notice of appeal given on that day. The bond on appeal was filed on the twelfth day of December, 1888.

Paragraph 837, Revised Statutes 1887, requires that a motion for a new trial shall be determined at the term when the motion is made. This requirement of the statute is mandatory. If a motion for a new trial be not acted upon during the term, it is discharged at the end of the term by operation of law. *McKean v. Ziller*, 9 Tex. 58. The remedy, in such a case, is to apply to the court for action upon the motion before the end of the term. *Laird v. State*, 15 Tex. 317.

The notice of appeal must be made during the term, and the bond on appeal must be filed within twenty days after the term, at which final judgment is entered. These requirements must be strictly complied with to give this court jurisdiction. In this case no notice of appeal was made during the term at which the judgment was entered, and no bond given until more than twenty days after the end of the term. These facts appearing upon the record, the appeal must be dismissed for want of jurisdiction. It is so ordered.

Wright, C. J., and Kibbey, J., concurring.

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[Civil No. 278. Filed April 18, 1890.]

[24 Pac. 257.]

**LEWIS WOLFLEY, Plaintiff and Appellee, v. GILA RIVER  
IRRIGATION COMPANY, Defendant and Appellant.**

1. **APPEAL AND ERROR—FAILURE TO FILE ASSIGNMENT OF ERRORS—EFFECT—REV. STATS. ARIZ. 1887, PAR. 940, CITED.**—The effect of a failure to file any assignment of errors is to waive all errors not apparent upon the record, and which do not go to the foundation of the action.
2. **SAME—SAME—APPELLATE COURT MAY AFFIRM OR DISMISS.**—In the absence of an assignment the court may either affirm the judgment of the court below or dismiss the appeal.

3. **SAME—SAME—PRACTICE—OBJECTION AT HEARING TREATED AS MOTION TO DISMISS.**—The objection having been made by the appellee at the hearing of the case, this may be taken as a motion to dismiss the appeal.
4. **SAME—RECORD—OMISSIONS—STATEMENT OF FACTS—BILL OF EXCEPTIONS—TIME OF PRESENTATION.**—Where there are numerous omissions to comply with the statutory provisions regulating appeals, no statement of facts, no bill of exceptions, preserved to the ruling upon the motion for new trial, and nothing in the record to show whether the bill of exceptions prepared, which was not settled till ninety days after the trial, was presented within ten days after the trial or filed within the term, the appeal will be dismissed.

**APPEAL** from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge. Appeal dismissed.

The facts are stated in the opinion.

H. N. Alexander, and Frank Cox, for Appellant.

Baker & Campbell, for Appellee.

Section 940, Revised Statutes of Arizona, provides: "The appellant or plaintiff in error shall in all cases file with the clerk of the court below an assignment of errors distinctly specifying the grounds on which he relies, before he takes the transcript of the record from the clerk's office, and a copy of such assignment of errors shall be attached to and form a part of the record, and all errors not so distinctly specified shall be considered as waived by the supreme court." No assignment of errors appears in the transcript. Any errors committed are therefore waived by the appellant. The appellate court will not take upon itself the duty of examining the transcript for the purpose of ascertaining whether error was committed in the court below. *Brown v. Tullis*, 7 Cal. 398; *Gray v. Salt River Valley Canal Co.*, 2 Ariz. 225, 12 Pac. 607. The judgment should be affirmed.

In the appellant's transcript there appears what purports to be a bill of exceptions. This cause was tried on the fifth day of June, 1889. Defendant's bill of exceptions was prepared, settled, and filed upon the sixth day of September, 1889, ninety days after the trial of the cause.

Section 828 of the Revised Statutes of Arizona provides that it shall be the duty of the party taking any bill of exceptions to reduce the same to writing and present the same to the judge for allowance during the term and within ten days after the conclusion of the trial. This the appellant has failed to do, and it has thereby waived any error occurring during the trial that it might have taken advantage of by bill of exceptions presented within the statutory time.

SLOAN, J.—An inspection of the record in this case shows that no assignment of errors has been filed. The case should be dismissed for the failure to comply with the plain provision of paragraph 940 of the Revised Statutes of 1887, which requires appellant to file with the clerk of the court below his assignment of errors. The effect of a failure to file any assignment of errors is to waive all errors not apparent upon the record, and which do not go to the foundation of the action. *Roy v. Bremond*, 22 Tex. 626; *Burns v. Wiley*, 35 Tex. 20; *Railroad Co. v. Scanlan*, 44 Tex. 649. In the absence of an assignment, the court may either affirm the judgment of the court below, or dismiss the appeal. *Dyer v. Dement*, 37 Tex. 431. The objection having been made by appellee at the hearing of the case, this may be taken as a motion to dismiss the appeal. *Chevallier v. Whitaker*, 8 Tex. 204.

Numerous other omissions to comply with the statutory provision regulating appeals are disclosed by the record. There is no statement of facts, nor anything purporting to be in the nature of a statement of facts. There is nothing but a minute entry of the clerk showing that the motion for a new trial was overruled, and no bill of exceptions was preserved to the ruling, if any there was. A bill of exceptions was prepared to a ruling of the court made during the trial, but was not settled until ninety days after the conclusion of the trial; but whether it was presented within ten days after the trial or filed during the term is not disclosed by the record. The appeal is dismissed.

Wright, C. J., and Kibbey, J., concurring.

[Civil No. 285. Filed April 18, 1890.]

[24 Pac. 182.]

**TERRITORY OF ARIZONA, Plaintiff and Appellant, v.  
DELINQUENT TAX-LIST OF THE COUNTY OF  
GILA FOR THE YEAR OF 1888. L. J. WEB-  
STER, and E. P. MONROE, Defendants and Appellees.**

1. **TAXATION—ASSESSMENT—VALUATION—MORTGAGE.**—Real estate is properly assessed for its full value, and no deduction should be made by reason of a mortgage.
2. **SAME—MORTGAGE—INCIDENT OF DEBT—PROMISSORY NOTE HELD BY NON-RESIDENT—TAXABLE ONLY AT PLACE OF RESIDENCE.**—A mortgage has no existence independent of the debt which it secures. Where the thing sought to be taxed is a debt due from a resident to a non-resident, and evidenced by a promissory note such tax is void, the *situs* of the note for the purpose of taxation being the place of residence of the owner.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Gila. William W. Porter, Judge. Affirmed as to E. P. Monroe and reversed as to L. J. Webster.

The facts are stated in the opinion.

Clark Churchill, Attorney-General, and J. B. McCabe, District Attorney, for Appellant.

Baker & Campbell, for Appellees.

The assessment against Monroe was upon personal property,—i. e. the solvent debt due him by L. J. Webster. The debt was taxable where the owner thereof resided.

“The weight of authority is with the view that the *situs* of the debt is that of its owner; that it is not property in the state of the debtor but is property only where the owner resides.” Burroughs on Taxation, sec. 41; *People v. Eastman*, 25 Cal. 602; *Cleveland R. R. Co. v. Pennsylvania*, 15 Wall. 300.

SLOAN, J.—This is an appeal by the territory from the judgment entered in the district court of the county of Gila

in the action to enforce the collection of the delinquent taxes of said county for the year 1888, so far as the judgment pertains to the taxes of L. J. Webster and E. P. Monroe, appellees herein. Webster was assessed the full value of lot 1, block 86, in the town of Globe, upon which lot there was a mortgage to secure a note held by E. P. Monroe as executor, the face value of which note was two thousand dollars. The court below, upon the objection of Webster, deducted the amount of the mortgage from his assessment. This is error, as the lot was properly assessed for its full value, and no deduction should have been made by reason of the mortgage. This error was confessed by counsel for Webster at the hearing of the case in this court. The note secured by the mortgage on Webster's lot was assessed to Monroe as executor. Monroe objected in the court below to any judgment against him upon the ground that he is a resident of the state of California, and upon the further ground that the estate, of which, as executor, he holds said note, is under the jurisdiction of the superior court of the city and county of San Francisco. The court found for objectant, and entered judgment in his favor. We find no error as to this part of the judgment. A mortgage has no existence independent of the debt which it secures. In this instance the thing sought to be taxed was a debt due from a resident of Arizona to a resident of California, and was evidenced by a promissory note. The note being of that species of property which pertains to and follows the person of the holder, its *situs* for the purpose of taxation could only be at the place of residence of the owner. This is so well settled that we need only cite the following cases: *Commissioners v. Cutter*, 3 Colo. 350; *People v. Eastman*, 25 Cal. 602; *Railroad Co. v. Pennsylvania*, 15 Wall. 300. The judgment against the territory in favor of E. P. Monroe is affirmed, and the judgment in favor of L. J. Webster is reversed, with instructions that the court below enter its judgment against him for the full amount of taxes sued for.

Wright, C. J., and Kibbey, J., concurring.

[Civil No. 256. Filed April 18, 1890.]

[73 Pac. 398.]

THE SANTA RITA LAND AND MINING COMPANY,  
Plaintiff and Appellant, v. T. LILLIE MERCER, De-  
fendant and Appellee.

1. **APPEAL AND ERROR—DEFECTIVE RECORD—REV. STATS. ARIZ. 1887, P. 185, PAR. 842, CITED—OBJECTIONS RAISED FOR FIRST TIME ON APPEAL WILL NOT BE CONSIDERED.**—Where the record contains neither motion for new trial, exceptions to the findings, exceptions to conclusions of law, statements of facts, nor bill of exceptions, there is no question presented for the consideration of an appellate court. The assignment of errors cannot be considered as the objections raised thereby are made here for the first time.
2. **SAME—FAILURE TO ALLEGE ERROR—JUDGMENT SUPPORTED BY PLEADINGS—AFFIRMED.**—Where error alleged cannot be reviewed and the judgment is fully supported by the pleadings an appellate court cannot search further for errors, and the judgment must be affirmed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. W. H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Haynes & Mitchell, for Appellant.

Hereford & Lovell, for Appellee.

KIBBEY, J.—The record in this cause presents no question for our consideration. The action was to recover possession of real estate. There was a trial by the court and judgment for the appellee, the defendant below.

The findings of the court, which are voluminous and elaborate, are copied into the transcript, but there was no exception reserved to them.

The minute entries of the clerk transcribed into the record before us refer to, and inferentially indicate, that there was a motion for a new trial.

The motion is not in the record in any way. Section 842



of the Revised Statutes of 1887 prescribes that the motion for a new trial may be made a part of the record and the manner in which it may be done.

Appellant did not except to the conclusion of law by the court upon the facts found.

Neither motion for a new trial, exception to the findings, exception to the conclusion of law, statement of facts, nor bill of exceptions are in the record.

We cannot consider the assignment of errors, as the objections raised thereby are made here for the first time. *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443; *Insurance Co. v. Milliken*, 64 Tex. 48; *Crowford v. McGinty*, 11 S. W. (Tex.) 1066.

The judgment is fully supported by the pleadings, and we cannot search further for errors.

The judgment must therefore be affirmed.

Wright, C. J., and Sloan, J., concurring.

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[Civil No. 271. Filed April 18, 1890.]

[24 Pac. 320, *sub nom.* Sutherland v. Putnam.]

J. D. PUTNAM, Plaintiff and Appellee, v. C. D. PUTNAM et al., Defendants, Interveners and Appellants.

1. APPEAL AND ERROR—JURISDICTION—BOND—REV. STATS. ARIZ. 1887, PAR. 849, CITED—FILING—END OF TERM—COMPARE *LOSE v. DORAN*, POST, P. 284, 73 PAC. 443—MUST APPEAR OF RECORD—BOND—ESSENTIALS—REV. STATS. ARIZ. 1887, PAR. 863, CITED—ORDER OF COURT FIXING AMOUNT VOID.—Paragraph 849, *supra*, requires that an appeal bond, or affidavit, be filed within twenty days after the expiration of the term at which judgment was rendered. The transcript should show affirmatively the date of adjournment of the term. Compare *Lose v. Doran*, *supra*. Presumptions cannot supply omissions therein of facts essential to the jurisdiction. The bond must describe the judgment appealed from, name all the parties thereto, and be payable to appellee in double the amount of the judgment and costs—paragraph 863, *supra*. An order of court fixing the amount of such bond is void.

2. SAME—ASSIGNMENT OF ERRORS—FORM—REV. STATS. ARIZ. 1887, PAR. 940, CITED—NECESSITY FOR—IN ABSENCE OF MAY DISREGARD ERRORS AND AFFIRM OR DISMISS.—Paragraph 940, Revised Statutes, requires the filing of assignment of errors. It should be a separate paper, signed by the party or his attorney, and filed with the clerk below before the appellant withdraws the transcript, and a copy should be attached thereto. This court is not bound to notice errors not properly assigned, and ordinarily may affirm the judgment or dismiss the appeal.
3. SAME—MOTION FOR NEW TRIAL—PRACTICE TO OBTAIN—REVIEW OF RULING UPON—REV. STATS. ARIZ. 1887, PARS. 833, 593, CLAUSE 2, 834, 842—DALTON v. RENTARIA, 2 ARIZ. 275, 15 PAC. REP. 37, CITED.—The only method by which to obtain a new trial is by motion therefor to the trial court, and, upon an adverse ruling, by appeal from that ruling. This court cannot consider any error which would be cause for a new trial unless a motion therefor upon that ground has been made to the court below, and such motion overruled, the ruling excepted to, and the motion embodied in a bill of exceptions, and the ruling properly assigned as error.
4. SAME—SAME—RULING—EXCEPTIONS—HOW BROUGHT INTO RECORD—PAR. 842, REV. STATS. ARIZ. 1887, CITED—MINUTE ENTRIES—BILL OF EXCEPTIONS—WHEN UNNECESSARY—PAR. 827 CITED.—Paragraph 842, Revised Statutes of Arizona, 1887, requires the motion for new trial, ruling, and exceptions to be brought into the record by a bill of exceptions. The minute entries by the clerk reciting the motion, ruling, and exception cannot serve this purpose. Paragraph 827 provides that where the ruling or other action of the court appears otherwise of record, a bill of exceptions shall not be necessary.
5. SAME—RECORD—WHAT CONSTITUTES—REV. STATS. ARIZ. 1887, PARS. 810, 832, 844, 845, 849, 874, 875, CITED.—The statutes, *supra*, prescribe what shall constitute the record.
6. SAME—BILL OF EXCEPTIONS—PURPOSE OF—COMPLIANCE WITH STATUTE.—The purpose of a bill of exceptions is to incorporate into the record as facts the action of the trial court complained of, and the objection thereto. The requirements of the statute that they shall be prepared within a specified time, presented to the trial judge, who shall after submitting them to the opposite party, if correct, sign them, cannot be dispensed with.
7. SAME—STATEMENT OF FACTS—REV. STATS. ARIZ. 1887, PARS. 843, 845, CITED—TIME FOR FILING.—Where the record fails to show that a paper purporting to be a statement of facts was filed in term time or within thirty days thereafter it must be disregarded.
8. SAME—SAME—CONTENTS.—The statement of facts must affirmatively show that it contains all the facts admitted, those agreed to have been proved, and the evidence of those disputed.

9. SAME—ERRORS—HOW MADE PART OF RECORD.—Exceptions to rulings upon admission or rejection of evidence may be saved by being included in statement of facts, provided rules governing bills of exceptions have been observed. Rulings upon motions and the like and exceptions thereto must be embodied in bills of exceptions. Every matter not otherwise made by statute a matter of record must be made so by a statement of facts or bill of exceptions to present it for review.
10. COURTS—SUPREME COURT—NO POWER TO MAKE RULES—PRACTICE IN TO BE DETERMINED BY JUDICIAL CONSTRUCTION.—The legislature has conferred no power upon this court to make rules of practice. These must be supplied by judicial construction.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. William W. Porter, Judge. Dismissed.

The facts are stated in the opinion.

G. H. Oury, and E. J. Edwards, for Appellants.

H. B. Summers, and Baker & Campbell, for Appellee.

KIBBEY, J.—This was an action in the lower court, by J. D. Putnam against C. D. Putnam, for a dissolution of a partnership alleged to have theretofore existed between them, and for an accounting, and praying for an injunction restraining the sheriff of Pinal County from selling a band of cattle, alleged to be partnership property, which had been levied upon and advertised at the instance of the intervener. The appellants, Sutherland et al., intervened, alleging themselves to be creditors of C. D. Putnam, denying the existence of the partnership, and claiming the property levied upon to be the individual property of C. D. Putnam, and therefore subject to levy and sale for the payment of their demands. There was a finding and judgment for the plaintiff, appellee, and against C. D. Putnam and the appellants Sutherland et al.

Upon an examination of the record, we cannot determine whether we have jurisdiction of the case. The statute requires, as essential to the right of appeal, that an appeal-bond, or affidavit in lieu thereof, shall be filed within twenty days after the expiration of the term at which the final

judgment was rendered. Rev. Stats. 1887, sec. 849. The judgment in this case was rendered on the 30th of October, 1888. The appeal-bond was filed on the 6th of February, 1889. We know judicially that a term of the district court for Pinal County began on the first Monday in October, 1888, but we can only know from the record when that term adjourned. The record in this case is silent upon the subject. The transcript should contain a copy of the order of adjournment of the term, in order that it may appear whether the appeal-bond was filed in time to perfect the appeal. *Burr v. Lewis*, 6 Tex. 76. (Compare *Lose v. Doran*, *post*, p. 284, 73 Pac. 443.) It is the duty of the appellants to see that a proper transcript of the cause is prepared, and filed in this court. We cannot supply by presumption omissions of statements of facts essential to the right of appeal. The appeal-bond, as it appears in the transcript, is defective. It is as follows: "Title of the court and cause. [sic] Whereas, the interveners in the above-entitled action have appealed to the supreme court of the territory of Arizona from a judgment made and entered in said cause against them in said court, and in favor of the plaintiff, on the thirtieth day of October, 1888, for the sum of \$205.75 costs, and also adjudged that certain property was not subject to the demand of said interveners, and the court having fixed the amount of the bond on appeal in the sum of one thousand dollars: Now, therefore, in consideration of such appeal, we, the undersigned residents of Pinal County, in said territory of Arizona, do hereby jointly and severally undertake and promise, on the part of the appellants, that they prosecute their appeal unto effect, and, in case the judgment of the appellate court shall be against them, that they will perform its judgment, sentence, or decree, and pay all such damages as may be awarded against them upon the appeal. Witness our hands this ninth day of January, 1889. Thomas F. Weiden. John C. Loss." A simple inspection of the above instrument discloses its defects. The judgment appealed from is not described. Neither the court wherein it was rendered, nor any of the parties to the record, are anywhere mentioned. It is possible that there is a caption to the original bond filed with the clerk, reciting the name of the court, and the names of

the parties, and that a reference to it might supply the defects mentioned. If so, and if those defects might be so remedied, then the caption is an essential part of the appeal-bond, and should have been copied into the transcript. The appeal-bond should state the names of all the parties to the judgment. *Jenkins v. McNeese*, 34 Tex. 189; *Chandler v. Sappington*, 36 Tex. 273; *Estate of O'Hara*, 60 Tex. 179. We cannot, as we have before said, supply the omission by presumption.

The bond is defective in another particular. The statute prescribed (Rev. Stats. 1887, sec. 863,) that the bond shall be payable to the appellee in a sum double the amount of the judgment and costs. The bond in this case is not made payable to the appellee, nor is it for any sum whatever. The recital in the bond indicates that the court fixed the sum in which it should be given. The statute prescribes the sum, and an order of court fixing it is not only unnecessary, but it is nugatory; and, if the order fixed an amount materially in excess of the amount required by the statute, and in pursuance of such order a bond was given in such excessive sum, the bond, on account of the imposition of the excessive condition, might be void, and the party's right of appeal thereby jeopardized. The appellee is entitled to a bond that substantially complies with the statute, and that is not subject to defenses for want of such compliance. *Janes v. Langham*, 29 Tex. 414; *Janes v. Reynolds*, 2 Tex. 253. We do not decide that this bond is void because of the excess in penalty, but suggest it simply to illustrate the danger of a departure from the plain statutory provisions in such particulars.

There is no proper assignment of errors in the record.

There is appended to a paper copied into the transcript, and immediately following the signature of the trial judge thereto, a statement that the "interveners specify the following particulars wherein the evidence in said cause is insufficient to justify said decision and judgment of the court: (1) The evidence is insufficient to justify said decision for the reason that it appears from the testimony . . . that the partnership had been dissolved; . . . that C. D. Putnam had disposed of his interest in said cattle prior to the levy. . . ,

(2) That the evidence is insufficient to justify said decision for the reason that it appears from the testimony of . . . that the partnership . . . had been dissolved long prior to said levy. (3) The evidence is insufficient to justify said decision," etc. This statement is not signed by any one, nor do the names of the appellants appear anywhere therein, and the paper to which it is appended is indorsed: "Statement of the case to be used on appeal." The statute requires the filing of an assignment of errors by the appellant or plaintiff in error. It should be a separate and distinct paper, signed by the party assigning the errors or by his attorney, and be filed with the clerk of the court below before the appellant takes the transcript from the office, and a copy of it be attached to the transcript. Rev. Stats. 1887, sec. 940. This statement, we think, is not an assignment of errors, either in name or in form, and the case should be affirmed for appellant's failure to file an assignment of errors. This court is not bound to notice errors not properly assigned, and will not ordinarily do so. *Geiselman v. Brown*, 30 Tex. 760; *Coburn v. Poe*, 40 Tex. 411; *Murchison v. Holly*, 40 Tex. 439. And, in the absence of an assignment of error, the court is ordinarily justified in either affirming the judgment, or dismissing the appeal. *Dyer v. Dement*, 37 Tex. 432; *Burns v. Wiley*, 35 Tex. 20; *Chevallier v. Whitaker*, 8 Tex. 204.

If however, we could treat the statement mentioned as a proper assignment of errors, we are confronted with another important question of practice; and for the purpose of considering it, we will assume that the errors are properly assigned. It is assigned as error that the evidence is insufficient to justify the decision of the court below. This error, if it is error, is good cause for a new trial. Our Code (sec. 833) provides that new trials may be granted on motion for good cause shown; and section 593 (cl. 2) confers upon this court jurisdiction to review an order granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or a proceeding. The only relief that appellants ask in this court, and all that this court can grant, is a new trial of the cause in the trial court. If it be true that the evidence is insufficient to warrant the de-

cision, it is error. If it is error, we must presume that the court below would, upon application, have corrected it. If, however, the court below had denied the motion for a new trial, such ruling could have been presented here for review. It is provided by the statute that the only remedy appellants seek here may have been awarded to them by the court below on motion. That method is prompt, efficacious, and inexpensive; and we think the appellants should first resort to it before coming to the appellate court. In a very early case in Texas the supreme court of that state (*Foster v. Smith*, 1 Tex. 70) say: "We will here take occasion to say that, according to what is believed to be the correct rule of practice, no judgment ought to be reversed in this court, merely on the ground that the verdict was not supported by the testimony, unless a motion had been made in the court where the verdict was rendered for a new trial and overruled." And see, also, following this case, *Hart v. Ware*, 8 Tex. 115; *King v. Gray*, 17 Tex. 62; *Pyron v. Grinder*, 25 Tex. 159; *Cain v. Mack*, 33 Tex. 135; *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863; *Jacobs v. Hawkins*, 63 Tex. 1. And in *Morris v. Gordon*, 36 Tex. 71, that court in referring to a statute which made the overruling of a motion for a new trial a prerequisite to an appeal to the supreme court, says: "And this is only a reiteration of the general rule that a party will not be heard in an appellate court until he has exhausted his remedies in the lower court." And this seems to us to be the true rule. It would be useless legislation to confer specifically upon this court jurisdiction to review orders refusing or granting new trials if it be held that, without such motion having been made and ruled upon, this court can review the very errors that are grounds for new trial upon appeal simply from the judgment. Section 833 gives the right to apply for a new trial. Section 834 provides that the grounds upon which it is founded shall be specifically stated, and that no others shall be considered. Section 842 provides that the motion, if overruled, may be embodied in a bill of exceptions, and so presented to, and the ruling thereon reviewed by, the supreme court. To hold that this court may consider errors occurring at the trial which are not urged upon motion below as grounds for a new trial, and

which, therefore, could not have been considered by the court below, is inconsistent and illogical. And we may remark here that there is not in the Texas code, from which our code is almost bodily taken, any provision similar to section 842. We think that our code contemplates that the only method by which to obtain a new trial is by motion therefor to the trial court, and, in case of adverse ruling thereon, by appeal from that ruling. This, of course, would exclude the consideration of any error that is good cause for new trial that was not specifically urged below. We are aware that the supreme court of Texas, in many cases, under a code of procedure from which ours is copied, have considered errors that were apparently not urged upon motion for new trial in the court below. We say "apparently," for, upon an examination of those cases, we are unable to determine whether such errors were or were not embodied in a motion for a new trial. This court has not before passed upon this subject, but in the case of *Dalton v. Rentaria*, 2 Ariz. 275, 15 Pac. 37, Wright, C. J., remarks: "Besides, the object of a motion for a new trial is to enable the appellate court to look into the evidence to see if it be sufficient to support the finding." But, nevertheless, we are of the opinion that sections 593 and 842, which are not in the Texas code, in connection with sections 833 and 834, compel the conclusion to which we have come, and that is that this court cannot consider any error which would be good cause for a new trial unless a motion for a new trial upon that ground had been made to the court below, and the motion had been overruled, and the ruling excepted to, and the motion embodied in a bill of exceptions, and the ruling assigned as error by a proper assignment. We have not cited the decisions of many, if not most, of the states, which, upon similar or analogous statutes, sustain the view we have taken, as a discussion of them would take too broad a scope; and for the same reason we do not notice others which seem to sustain a contrary view.

Resuming our examination of the transcript filed in this case, we find copied into it a motion for a new trial, but it is not embodied in a bill of exceptions. Section 842 of the Revised Statutes of 1887, prescribes the method of getting the motion for a new trial, and ruling upon it, into the record.



It must be done by bill of exceptions. The motion and the ruling upon it are consequently not before us. There is also a minute entry, made by the clerk, reciting the fact that on the 30th of October, 1888, the interveners filed their written motion for a new trial, which motion was overruled by the court, and the interveners then excepted. As we have before said, section 842 requires the motion, ruling, and exception to be brought into the record by a bill of exceptions. The minute entries by the clerk cannot serve this purpose. Section 827 provides that, where the ruling or other action of the court appears otherwise of record, a bill of exceptions shall not be necessary. The statute prescribes what shall constitute the record. It consists of the papers; that is, the summons, pleadings, verdict, and copy of the judgment (section 810), and bills of exception, statements of fact (section 844), notice of appeal (section 849), appeal-bond (section 875), assignment of errors (section 875), and statement of the costs (section 875), order of court granting time beyond term for filing statement of facts (section 845), affidavits of bystanders in aid of a bill of exceptions (section 832), the agreed statement provided by section 874, etc. The office of a bill of exceptions, under our code, is to incorporate into the record as facts the ruling or other action of the trial court complained of and the objection of the parties thereto; and the statute, in order that these facts may be correctly stated, and be thereafter uncontrovertible, requires that they shall be stated in a bill or bills of exceptions; that it shall be done within a specified time (generally within so short a time that the memory of the actors may not fail); that the bill so prepared shall be presented to the trial judge for examination, and by the judge submitted to the opposite party; and finally, if correct, that it shall be authenticated by the signature of the judge. It cannot be contemplated that all these requirements, prescribed to secure accuracy, may be dispensed with, and supplied by the entry of the clerk upon his minute-book. See *Bowman v. State*, 40 Tex. 8; *Young v. Martin*, 8 Wall. 354.

At the close of a paper designated by the appellants a "statement of the case," and in which is incorporated what purports to be the evidence adduced upon the trial of this cause below, is the following: "And be it further remembered

that on the thirtieth day of October, 1888, [the court] overruled said motion for a new trial, to which ruling and decision of the court the interveners duly excepted, and in open court gave notice of appeal to the supreme court. *Bill of Exceptions*. Be it remembered that on said thirtieth day of October, 1888, the interveners presented their bill of exceptions to the judge, excepting to the ruling and decision of the court in refusing to grant them a new trial in said cause, which said exception was duly allowed. I, Wm. W. Porter, judge of the district court, hereby certify that the foregoing statement of facts is correct, and is dated February 6th, 1889. Wm. W. Porter, District Judge."

As we have before noted, this paper is designated in the caption as a "statement of the case." It is indorsed: "Statement of the case to be used on appeal." It is certified by the judge to be a "statement of facts." It has appended to it, and as a part of it, a specification of particulars wherein the evidence fails to sustain the decision, and it assumes the functions of a bill of exceptions. The statute (section 843) provides for the making out and filing of a statement of the facts given in evidence on the trial. Such statement shall be made out and submitted to the opposite party for inspection; and, if the parties agree upon the same, they shall sign it, and submit it to the judge, who shall, if he find it correct, approve and sign it, and it shall be filed with the clerk during the term. The court may, by order entered of record during the term, authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term. Sec. 845. On the 14th of December, 1888, the court ordered that the interveners have thirty days after the term in which to prepare the statement on appeal. The statement was filed on the 15th of February, 1889. As we have before suggested with reference to the filing of the appeal-bond, we cannot say whether this statement was filed in term time, or, if not, within thirty days after adjournment; the record not disclosing when the term did adjourn. We would consequently have to disregard the statement of facts.

We will next consider this statement in its aspect as a bill of exceptions. By a rule adopted by the supreme court of

Texas, it is provided that exceptions to evidence admitted over objections made at the trial may be embraced in the statement of facts, in connection with the evidence objected. Rule 56 for district courts, Texas. In practice, in that state, the rule has become extended so that it is permitted to embrace exceptions to many other rulings than to those admitting evidence over objections. We think that the practice to allow exceptions to the admission of evidence, as well as to the rejection of proposed evidence, and other rulings and actions of court during the progress of the actual trial of the cause, to be embraced in the statement of facts, is to be commended, as being convenient, simple, and expeditious, and as tending to render the record less cumbersome. But we cannot dispense with the formalities required in cases of bills of exceptions. The statute requires that the bill of exceptions must be presented to the judge within ten days after the conclusion of the trial, and during the term, and that it must be filed during the term; and, if a party resorts to this method of making a record of his objections to the rulings below, he must follow the rules prescribed for bills of exceptions, and not those governing statements of facts. *Howard v. Houston*, 59 Tex. 76; *Railroad Co. v. Eddins*, 60 Tex. 656; *Lockett v. Schurenberg*, 60 Tex. 610; *Railway Co. v. Joachimi*, 58 Tex. 454; *Blum v. Schram*, 58 Tex. 528; *Morris v. Rhine*, (Tex.) 8 S. W. 315. The statement in this case was not filed in the time prescribed for filing bills of exceptions, and cannot be considered as such. We do not wish to be understood as approving the practice of embodying motions for new trials, and the rulings thereon, in the record, by incorporating them in the statement of facts. On the contrary, we do not think it authorized, and distinctly disapprove of it. A statement of facts should contain a statement of the facts pertinent to the issues joined, admitted or agreed to have been proved, and the evidence of those not admitted or agreed to have been proved, adduced at the trial. It is unnecessary and improper to embrace in the statement of facts the unnecessary verbiage of witnesses; the commissions and other formalities of depositions, unless some error is alleged concerning such formalities; the full context of deeds or other documentary evidence, when there is no dispute of them,—a statement of

their legal effect as evidence being sufficient. See *Kemper v. Victoria*, 3 Tex. 135; *Wright v. Wright*, 6 Tex. 3; *Hawkins v. Lee*, 22 Tex. 544. And the statement must affirmatively show that it does contain all the facts admitted; those agreed to have been proved, and the evidence of those disputed. The instrument which is the foundation of a cause of action or defense should, however, appear in full. Exceptions to the ruling of the court in admitting or rejecting evidence may be embraced in the statement of facts, and will be as well saved in that manner as if embodied in a bill of exceptions, if the requisites of the statute relative to the preparation, presentation, allowing, and filing of bills of exceptions shall have been observed. Motions for new trials or in arrest of judgment, (Rev. Stats. 1887, sec. 842); for continuance; for change of venue, and all incidental motions, as motions to strike out the whole or parts of pleadings; for bills of particulars, to make pleadings more specific; for abstracts of title, and the like, and the rulings thereon, and the exceptions to the rulings, must be embodied in bills of exceptions in order that they may become parts of the record of the cause in this court. In short, every matter not otherwise made by statute a matter of record must be made so by a statement of facts or a bill of exceptions if we are required to review such matter. Reference to the Texas decisions will discover that many matters of practice are determined by reference to rules adopted by the supreme court of that state for the various courts of the state. But, so far as those rules are pertinent to matters we have discussed in this opinion, we regard them simply as restatements of statutory requirements or judicial constructions of the code, and as such are authoritative guides for us. The constitution of Texas confers upon the supreme court of that state power to make rules and regulations for the government of that and the other courts of the state, to regulate proceedings, and expedite the dispatch of business therein. Const. Tex., art. 5, sec. 25. While our present Code of Civil Procedure is almost a rescript of that of Texas, the legislature of this territory did not confer upon this court the power to make rules and regulations. It is for the reason that very much contained in the rules prescribed by the supreme court of Texas regulating the practice there

must be supplied here by judicial construction that we have felt it our duty to announce, upon this opportunity, so far as the questions were presented by the record, our construction of the present code. While we might have disposed of this case by dismissal, for the reason that the record does not disclose that the appeal had been perfected in time, and a decision upon subsequent matters has been unnecessary to the disposal of the case, we have been prompted to examine the whole record, and point out the defects in matters of practice appearing there, by the fact that many other causes depending on the docket are in more or less degree likewise defective. This cause was commenced while the former code (Comp. Laws 1877) was in force, and was tried only a short time after the present code came in force; and, not unnaturally, appellant, from mere force of habit, attempted to perfect his appeal under the former code. Much confusion in the practice in this and the district courts has arisen from this change of our Code of Practice as it existed prior to July, 1887, to one radically different, adopted that year.

For the reason that it does not appear that this appeal was ever properly perfected, this cause must be dismissed. We can say, however, that we have read the evidence transcribed into the record; and, while it may be in some particulars contradictory and conflicting, yet, under the familiar rule in such cases, we will not disturb the finding of the court below. The appeal is dismissed.

Wright, C. J., concurs. Sloan, J., took no part in the consideration of this appeal.

[Civil No. 270. Filed April 18, 1890.]

[24 Pac. 324.]

A. P. TIETJEN, Plaintiff and Appellee, v. J. S. SNEAD,  
Defendant and Appellant.

1. LEASE—WRITTEN AGREEMENT—PLEADING—PAROL CONTEMPORANEOUS AGREEMENT—EVIDENCE.—A written agreement to lease definite as to subject-matter, price, and term is complete within itself, and demurrer to an answer pleading a prior or contemporaneous verbal agreement is properly sustained, it being merged in the written agreement and cannot be varied by proof of a verbal understanding.
2. PLEADING—ARGUMENTATIVE.—An answer which alleges the terms of an agreement argumentatively and inferentially and not directly is bad.
3. APPEAL AND ERROR—STATEMENT OF FACTS—MUST BE SIGNED BY TRIAL JUDGE.—A statement of facts not having been approved or signed by the trial judge cannot be considered by this court.
4. SAME—MOTION FOR NEW TRIAL—RULING—MUST BE EMBODIED IN BILL OF EXCEPTIONS—OTHERWISE ERROR GROUND FOR NEW TRIAL WAIVED—REV. STATS. ARIZ. 1887, PAR. 842, CITED—PUTNAM v. PUTNAM ET AL., ANTE, P. 182, 24 PAC. 320, CITED.—The motion for new trial and the ruling thereon not having been embodied in a bill of exceptions, as required by section 842, *supra*, we cannot consider any error on the ruling on the motion. Nor can we consider any error that might have been urged as ground for a new trial below, unless it had been so urged. *Putnam v. Putnam, supra*, cited.
5. SAME—BILL OF EXCEPTIONS—ERROR MUST AFFIRMATIVELY APPEAR—PRESUMPTION THAT RULING IS CORRECT.—An exception to a ruling of the trial court in excluding evidence is not properly stated where it is not shown that the witnesses were competent, nor that any competent questions were propounded, nor that the answer thereto, if allowed, would have been favorable to the appellant. The exclusion may have been proper, or the party complaining may not have been injured, and until the contrary is shown the presumption is in favor of the correctness of the ruling.
6. SAME—BILL OF EXCEPTIONS—MUST SHOW IT WAS SUBMITTED TO OPPOSITE PARTY—REV. STATS. ARIZ. 1887, PAR. 829, CITED.—The bill of exceptions must show that it has been submitted to the opposite party before it was signed and filed, as required by section 829, *supra*.

7. SAME—BURDEN OF ESTABLISHING—PRESUMPTIONS IN FAVOR OF JUDGMENT.—The burden of establishing error is upon the appellant, and every presumption must be indulged by this court in favor of the judgment of the lower court.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge. Affirmed.

The facts are stated in the opinion.

Goodrich & Street, for Appellants.

The exhibit attached to the complaint shows that it is not a lease, but only a memorandum of a part of the transaction. Defendant alleged in his answer that it expressed only a part of the transaction and should have been allowed to prove that fact, as also what the full transaction and agreement was.

Parol evidence may be admitted when a part only of the contract was reduced to writing. 1 Greenleaf on Evidence, sec. 284a; 2 Wharton on Evidence, secs. 926, 927-1015; 2 Parsons on Contracts, sec. 550.

If defendant had proven the facts set up in his answer the whole fault would have been found to be with the plaintiff. The defendant would have cleared himself from the imputation of a breach of the contract. 1 Smith's Leading Cases, 8th ed., 934-936, *Wigglesworth v. Dallison*.

Edwards & Buck, for Appellee.

KIBBEY, J.—This was an action by appellee against appellant for damages for the breach of a contract for a lease of a store-room in Phoenix. Appellant demurred to the complaint, and the demurrer was overruled. Appellant pleaded the general denial, and specially that the written memorandum of the contract did not embody the whole agreement, but that a part of it rested in parol, and alleging breach by appellant. A demurrer to the special plea was sustained, and the ruling excepted to. There was a trial by the court. Finding and judgment for appellee. Motion for new trial by appellant overruled. The errors assigned are the sustaining

of the demurrer to appellant's special answer, and the admission and exclusion of certain evidence. The written memorandum, which is the foundation of appellee's cause of action, is as follows: "Exhibit A. Phoenix, Arizona, Feb. 21, '88. J. S. Snead hereby guaranty to furnish A. P. Tietjen with a lease for the whole store-room which stands upon the east part of lot eight (8), block twenty-one (21), in the city of Phoenix, Maricopa County, which said building fronts to the north side of Washington Street in said city. The above lease to be at least for the term of one year, at one hundred and forty dollars (\$140.00) per month rent. But this guaranty shall not hold good in case the property is sold before that time. Lease to begin Oct. 1st, 1888. J. S. Snead, A. P. Tietjen." Appellant alleges in his answer that, at the time he and appellee entered into that agreement, the appellee and another were partners; that the agreement was made with the understanding that appellee and his partner should occupy the room for a particular purpose; that such occupancy was one of the main and essential conditions of the lease guaranteed; that, long before the day fixed for the commencement of the proposed lease, appellee and his partner dissolved their partnership, and none of the members of the firm desired the room in question for the purpose contemplated; that, at the time appellee demanded the lease in pursuance of the agreement he did so for himself alone, and for another purpose; that appellant, up to the 1st of October, 1888, was ready and willing to comply with his agreement as herein set forth.

We think the agreement sued on was complete and entire within itself. It was definite as to the subject-matter, price, and term; and any prior or contemporaneous verbal agreement must be deemed to have been merged in the written memorandum, and that cannot be varied by proof of such verbal understanding. The demurrer was properly sustained. This answer is further objectionable because the terms of the verbal part of the agreement are not alleged directly, but argumentatively and inferentially.

The statement of facts is not approved or signed by the judge of the district court. We cannot, therefore, consider it a part of the record. Rev. Stats. 1887, sec. 844; *Wampler*



v. *Walker*, 28 Tex. 598; *Witten v. Poindexter*, 25 Tex. Supp. 378. The motion for a new trial is not, nor is the ruling thereon, embodied in a bill of exceptions, as required by section 842; and hence we cannot consider any error in the ruling upon the motion. Nor can we consider any error that might have been urged as a ground for a new trial below, unless it had been so urged. See *Sutherland v. Putnam*, ante, p. 182, 24 Pac. 320, (at this term). The bill of exceptions in the transcript does not contain enough of the evidence given at the trial to explain the objections and rulings complained of, and reference cannot be had to the statement of facts, for the reason above stated. The bill of exceptions contains none of the evidence. Secs. 824, 825.

In the bill of exceptions it is stated that at the trial the defendant "offered to introduce George F. Coats, Charles Goldman, E. Ganz, W. T. Smith, William Pimm, as witnesses for himself, to show that they knew the value of leaseholds, for the purpose of fixing the measure of damages, and showing the damages which defendant suffered by the breach of his agreement; that the court refused to allow them to testify, and refused the defendant the right to such evidence, to which defendant objected and excepted." This statement is a little confusing. There is no issue in the case making evidence to show damages to the defendant pertinent. We suppose this a clerical error in the substitution of the word "defendant" for "plaintiff." But the exception is not properly stated. It is not shown that the witnesses were competent, nor that any competent questions were propounded to them, or any of them. Their exclusion may have been proper on that account; and, until the contrary is shown, we must presume in favor of the ruling of the court. And further, it is not shown what answer would have been made by the witnesses, and we cannot assume that they would or would not have been favorable to the appellant. If the answers would have been adverse to the appellant, he would not have been injured, and cannot complain, and, if the answers would have been favorable, the record should have shown the fact to have disclosed the error. The party alleging the error must establish it. *McAuley v. Harris*, 71 Tex. 631, 9 S. W. 679-683; *Railroad Co. v. Johnson*, (Tex.) 7 S. W. 378;

*Jacoby v. Brigman*, (Tex.) 7. S. W. 367; *Moss v. Cameron*, 66 Tex. 412, 1 S. W. 177.

The bill of exceptions does not show that it has been submitted to the opposite party before it was signed and filed, as required by section 829. This should be shown. These rules of practice are intended for the protection of litigants, and are the result of many years' efforts to devise means to that end.

It is a matter known to all the profession and to the courts that many cases have been affirmed which, had the entire proceedings, or that part of them pertinent to the question considered, been presented to the appellate court, would have been reversed. The burden of establishing error is upon the appellant, and every presumption must be indulged by this court in favor of the judgment of the lower court. *Lockhart v. Keller*, (Tex.) 9 S. W. 179, 181.

The judgment is affirmed.

Wright, C. J., and Sloan, J., concurring.

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[Criminal No. 61. Filed April 19, 1890.]

[24 Pac. 183.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.  
A. LEONARD MEYER, Defendant and Appellant.**

1. **CRIMINAL LAW—EVIDENCE.**—Evidence to show that between March 12 and April 15, 1889, the defendant Meyer, agent of Wells, Fargo & Co., disposed of certain of its money orders for his personal benefit was admissible as tending to connect defendant with any shortage in the office after April 15th, although it was admitted that the money-order business had been correctly reported up to said date, for the reason that these reports were not sent in when due, but were retained by defendant for days after they should have been forwarded.
2. **SAME—SAME—ADMISSION—STATEMENTS MADE BY AUTHORITY OF ACCUSED.**—Where it is the duty of a clerk to make out statements of the business of the office, under defendant's instructions, and such statements so made are placed upon defendant's desk, where he is frequently, and called to his attention, the evidence is sufficient to show that defendant has knowledge of their contents,

and they are properly admitted as admissions by defendant as to their contents.

3. **SAME—INSTRUCTIONS TO JURY—PROOF OF EMBEZZLEMENT OF MONEY ORDERS SUFFICIENT UNDER INDICTMENT FOR EMBEZZLING MONEY.**—Defendant used money orders, for his own benefit, in form and purporting on their face to be receipts for money by defendant, as agent of the company, to be repaid to the holders by the company. In legal effect such use amounted to a payment to him of the money they called for, and he is estopped from denying its receipt. An instruction, upon a trial for embezzlement of money, that if the jury should believe from the evidence that the defendant used certain orders in the payment of his debts, and that he did not actually receive the money for them, he could not be convicted for the embezzlement of the orders, is properly refused.
4. **SAME—SAME—AGENT ENTITLED TO COMMISSION NOT PART OWNER.**—An instruction asked by defendant, that if defendant was agent of the company and entitled to a commission on the net proceeds he would be a part owner therein and could not be guilty of embezzlement should he convert the whole thereof to his own use, is properly refused.
5. **SAME—REV. STATS. ARIZ. 1887, SEC. 788, OF PENAL CODE, CITED AND CONSTRUED—ELEMENTS OF CRIME—AGENT ENTITLED TO COMMISSION—TRUSTEE AS TO REMAINDER.**—To sustain a conviction under the statute, these facts must be shown: (1) The trust relation; (2) the possession or control of the property by virtue of the trust; and (3) the fraudulent appropriation of the property not in the due and lawful execution of the trust. If an agent authorized to carry on a business for his principal receives a commission upon the proceeds of the business he is still a trustee for the use of his principal as to the remainder, and has in his possession property by virtue of his trust.

**APPEAL** from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, Edwards & Buck, and Frank Baxter, for Appellant.

Clark Churchill, Attorney-General, Frank Cox, District Attorney, and Goodrich & Street, of counsel, for Respondent.

Abstract and immaterial error is insufficient to reverse a judgment. *People v. Ybarra*, 17 Cal. 166; *People v. Brother-*

ton, 47 Cal. 388-404; *People v. Turley*, 50 Cal. 469; *People v. Sprague*, 53 Cal. 491; *People v. Walsh*, 43 Cal. 447-451; *People v. March*, 6 Cal. 543-547; *People v. Moore*, 8 Cal. 90.

An instruction must be wholly erroneous or susceptible of doubtful construction to warrant an appellate court in saying the jury were misled. *People v. Moore*, 8 Cal. 90.

The supreme court will not disturb a judgment in a criminal case on the ground that the evidence was insufficient to justify the verdict unless there is a total deficiency of evidence, or it preponderates so greatly against the verdict as to render it clear that the jury must have acted under the influence of passion or prejudice. *People v. Manning*, 48 Cal. 335.

SLOAN, J.—The defendant, A. Leonard Meyer, was tried at the October term, 1889, of the district court of Maricopa County upon an indictment charging him with having, as the agent of Wells, Fargo & Co., embezzled from the company the sum of \$5,800. The jury returned a verdict of guilty. Defendant moved for a new trial, which was denied. From the judgment of conviction and the order denying a new trial defendant appeals. The proof shows that Meyer was the agent of Wells, Fargo & Co., a corporation, and as such agent had general charge of the express and money-order business of the company at Phoenix, Arizona. He was allowed a commission upon the freight business of the office, and was entitled to the amount due him, no matter where collected, at the end of each month, when he settled with the company. He was also allowed a small commission upon the amount of money orders sold by him. He received no other compensation. It was his duty to send into the general office of the company at San Francisco weekly reports of the money-order business done, with the amounts due the company, and at the end of each month to make a report of the freight business done through the office, and send in the amounts of receipt therefrom after deducting his commissions. At the trial the prosecution was permitted to show that between March 12 and April 15, 1889, Meyer disposed of certain money orders of Wells, Fargo & Co. to various persons, some in payment of individual debts, and others for the purpose of raising money thereon for his personal use. Counsel for the defendant

objected to the introduction of this evidence upon the ground that the same was immaterial and irrelevant, for the reason that these money orders had been disposed of prior to April 15th, when it was admitted that the money-order business had been correctly reported by Meyer up to said date. It appeared in proof, however, that the money-order reports up to and including the one for April 15th were not sent in when due, but were retained by defendant for days after they should have been forwarded; and for this reason we think the evidence was admissible as tending to connect defendant with any shortage in the office after April 15th.

Counsel for defendant urge that the court erred in admitting over objection certain statements not in the handwriting of defendant, showing the business of the office for the month of April and part of the month of May, being the time in which it is claimed by the prosecution that the shortage in Meyer's accounts with the company occurred. These statements were made out by one P. B. Yates, who was a clerk in the employ of Meyer. According to the testimony of Yates, it was his duty to make out the reports and statements of the business of the office, and that Meyer had always settled with the company from them; that the statements introduced in evidence were made out by him under Meyer's instructions, and were left by him upon Meyer's desk in the office for Meyer's inspection; that these remained there until Meyer left Phoenix, in May, and that during this time Meyer was frequently in his office and at his desk; that just before Meyer left Phoenix his attention was called to the fact by Yates that these statements had not been sent into the general office of the company. We think that the evidence is sufficient to show that Meyer had a knowledge of the contents of these statements; and having been made out by his direction, they were properly admitted as admissions by defendant as to their contents. We have carefully considered the instructions given by the court; and, although one or two of them are open to criticism if considered apart from the others, the instructions as a whole are sufficiently explicit, and very fully state the law of the case.

A number of instructions were asked for by the defendant which were refused by the trial court. Two of these present

questions of some interest and importance. The first of these, numbered 6, reads as follows: "The defendant is charged in the indictment with fraudulently appropriating and embezzling money, and under this indictment he cannot be convicted of embezzling money orders. If the jury should believe from the evidence that the defendant used certain orders in the payment of his private debts, and that he did not actually receive the money for them, then in that event he could not be convicted under this indictment for the embezzlement of those orders." The money orders referred to in the instruction were money orders of Wells, Fargo & Co. These were in form, and purported upon their face to be, receipts for money by Meyer, as the agent of the company, to be repaid to the holders by the company, at any of certain designated offices of the company, when presented. They were all paid by the company to the holders. In legal effect, the disposition of these money orders by Meyer in payment of his debts amounted to a payment to him of the money they called for, and he is estopped from denying its receipt.

The ninth instruction asked for by defendant is as follows: "The jury are instructed that, if they believe from the evidence in this case that the defendant was the agent of Wells, Fargo & Co.; that he received for his services a commission of ten per cent of the net proceeds of the earnings of the office at Phoenix,—then in that event he would be a part owner of the net proceeds, and he could not be convicted of the crime of embezzlement should he convert the whole of the earnings to his own use." The indictment in this case was evidently drawn under section 788 of the Penal Code. This section was meant to apply to persons occupying fiduciary relations, such as public officers and officers and agents of corporations, public and private. To sustain a conviction under this section, three facts must be shown:—1. The trust relation; 2. The possession or control of property by virtue of the trust; and 3. The fraudulent appropriation of the property not in the due and lawful execution of the trust. If an agent of a corporation authorized to carry on a business for his principal receives a commission upon the proceeds of the business, he is still a trustee for the use of his principal as to the remainder, and has in his possession property by virtue

of his trust. In this case, Meyer was required to send at stated intervals the amount of the receipts of the office less his commission. These amounts, at least, he held in trust for the corporation, and it was these which constituted the subject-matter of the embezzlement.

The cases cited by appellant's counsel were cases applying to persons occupying different relations to that of Meyer, and were under different statutes, and hence have no bearing upon this case. The evidence is, we think, sufficient to sustain the verdict.

The judgment and order must be affirmed, and it is so ordered.

Wright, C. J., and Kibbey, J., concurring.

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[Civil No. 291. Filed September 2, 1890.]

[32 Pac. 266.]

A. B. KOONS et al., Plaintiffs and Appellants, v. THE ARIZONA MINING COMPANY and THE PHOENIX MINING COMPANY, Defendants and Appellees.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL—ASSIGNMENTS OF ERROR—PUTNAM v. PUTNAM, ANTE, P. 182, 24 PAC. 320, FOLLOWED—FUNDAMENTAL ERROR.—Where there are no errors assigned other than such as might have been good cause for a new trial and no bill of exceptions was preserved to the ruling of the court upon motion for a new trial, this court cannot consider the errors assigned. *Putnam v. Putnam, supra*, followed. No errors appearing on the face of the record the judgment will be affirmed.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge. Affirmed.

The facts are stated in the opinion.

Edwards & Buck, for Appellants.

L. H. Chalmers, and Baker & Campbell, for Appellees.

PER CURIAM.—Upon the authority of *Putnam v. Putnam*, ante, p. 182, 24 Pac. 320, we cannot consider the errors assigned by appellants in this case, as no bill of exceptions was preserved to the ruling of the court upon the motion for a new trial.

There is nothing but the minute entries of the clerk in this transcript showing that the motion was ever made or acted upon by the court. All the errors assigned might have been good cause for a new trial, and should have been urged in the court below in their motion, and if an adverse ruling was made, this ruling excepted to and presented to us by a proper bill of exceptions.

As no error appears upon the face of the record, the judgment of the court below is affirmed.

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[Civil No. 288. Filed September 2, 1890.]

[73 Pac. 399.]

**F. K. MILLER**, Plaintiff and Appellee, v. **A. A. GREEN**,  
Defendant and Appellant.

1. **APPEAL AND ERROR—CONFLICT IN EVIDENCE.**—Where there is a conflict in evidence this court will not interfere with the finding of the trial court.
2. **SAME—BILL OF PARTICULARS—OBJECTIONS—MUST BE MADE IN THE TRIAL COURT—MUST BE SPECIFIC.**—Objection that a bill of particulars is not sufficiently particular must be made in the court below and the objection should be specific.
3. **SAME—EVIDENCE—ADMISSION OF IMMATERIAL AND IRRELEVANT EVIDENCE—TRIAL BY COURT—BURDEN OF SHOWING INJURY ON APPELLANT.**—Error of the trial court in admitting irrelevant and immaterial evidence, where the trial is before the court, will not avail on appeal in absence of a showing that it affected the judgment of the court. The burden is on the objector to show that it was likely to affect the material question in the case.
4. **SAME—EXPERT EVIDENCE—HARMLESS ERROR.**—Error in admitting expert evidence to prove the value of services is harmless where the value of the services is conceded by appellant.



5. **SAME—EXCLUSION OF EVIDENCE—IMMATERIAL.**—Evidence, offered and excluded in an action for attorney's fees, that other attorneys were employed by appellant does not seem to have been offered for the purpose of tending to show that appellee was not employed by appellant—the question in the case—if it would tend to show that fact. Its exclusion is not urged or embraced in the motion for a new trial and affords no ground for reversal.
6. **SAME—MOTION FOR NEW TRIAL—MUST BE SIGNED BY PARTY OR ATTORNEY—REV. STATS. ARIZ. 1887, PAR. 834, CITED.**—Motion for new trial is required by statute, *supra*, to be signed by party or his attorney.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Hereford & Hereford, for Appellant.

Jeffords & Franklin, for Appellee.

PER CURIAM.—The appellee recovered judgment in the court below against the appellant for legal services in the sum of five hundred dollars. The appellant concedes that the recovery was not too large if the appellee rendered the services he claimed to have rendered, and did it at the request of appellant. On the subject of the value of the services there was evidence of witnesses on a hypothetical case which amply sustains the finding of the court. The only question, then, on the merits which remains was, Did the evidence prove that plaintiff below (appellee) rendered the services, and at the request of appellant? The appellee testified that he did. The appellant testified that the services were not rendered at all, that he did not employ appellee as an attorney, and that the services were not rendered for him or at his request. This raised a question of fact, where there was a conflict of evidence. The trial court heard all the evidence, saw the witnesses on the stand, and was in a better position to settle the preponderance than this court. Conceding there was but one witness on each side of the issue, this court cannot say that the trial court may not have believed one and disbelieved the other.

But it is stoutly urged that the court should have required a bill of particulars. There is a bill of particulars in what purports to be a bill of exceptions. If this bill of particulars was not sufficiently particular, objection should have been made to it in the court below, and the objections should have been specific and particular.

The objection that the court erred in admitting the evidence of C. C. Stephens, on the ground that the evidence of Stephens was irrelevant and immaterial, cannot avail in this court, for it does not appear that the irrelevant and immaterial evidence, if it was such, was on the material controversy in this case, or in any way affecting the finding or judgment of the court. The trial was by the judge, and not a jury; and even in the case of a jury trial some irrelevant and immaterial evidence may be admitted, and yet have no effect on their finding. The burden is on the objector to show that it was of such character and force as to have been likely to affect the vital or material question in the case.

Another objection urged was the admission of expert evidence to prove the value of the alleged services. As appellant concedes the value of the services, and only contends that they were not rendered for appellant, it is not necessary to further consider this objection.

The evidence offered by appellant, and excluded by the court, that other attorneys were employed by appellant, does not seem to have been offered for the purpose of tending to show that appellee was not employed by appellant—the vital question in the case—if it would tend to show that fact. Nor does the exclusion of this evidence seem to be urged in the motion for a new trial as one of the grounds therefor. It is not embraced in the motion for a new trial.

The motion for a new trial does not appear to have been signed by the party or his attorney, as required by paragraph 834 of the Revised Statutes of 1887. But even on the face of the transcript—not the record—we do not see good grounds for reversing the action of the court below.

The judgment below will be affirmed.

[Civil No. 290. Filed September 2, 1890.]

[73 Pac. 448.]

THE COUNTY OF COCHISE, Plaintiff and Appellant, v.  
A. J. RITTER, as County Treasurer and ex-officio Tax  
Collector of said County, et al., Defendants and Ap-  
pellees.

1. **APPEAL AND ERROR—ASSIGNMENT OF ERRORS—FAILURE TO ASSIGN ERROR WAIVES ERRORS NOT FUNDAMENTAL—PRACTICE—MOTION TO DISMISS APPEAL.**—A motion to dismiss an appeal upon the ground that there is no assignment of error in the record must prevail unless the record shows error on its face.
2. **OFFICERS—OFFICIAL BOND—WITHDRAWAL OF SURETY—RELEASES ALL**—LAWS 1883, PP. 158, 159, NO. 63, CONSTRUED—MUST GIVE NEW BOND.—When a surety upon the joint and several bond of a county officer gives notice of his desire to be released from all further liability thereon, in conformity to statute, *supra*, such withdrawal operates as a release of all the sureties. The statute requires in such an event the officer to give, not other or additional surety, but a new bond.
3. **SAME—SAME—STATUTE PART OF CONTRACT—REPEAL—REV. STATS. ARIZ. 1887, PAR. 3101, CITED—IMPAIRING OBLIGATION OF CONTRACT.**—A statute in force at the time a bond is given becomes a part of the contract and any subsequent act of the legislature cannot vary the contract without the consent of the sureties.

**APPEAL** from a judgment of the District Court of the First Judicial District in and for the County of Cochise. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Clark Churchill, Attorney-General, and W. H. Stilwell, District Attorney, for Appellant.

Defendants contend that the withdrawal of said Costello as surety in October, 1887, worked a release of all the other sureties on said bond, and cite *People v. Buster*, 11 Cal. 215.

This bond was given under act No. 63, approved March 6, 1883. Section 7 enumerates the breaches for which the principal and sureties shall be held liable "during the time such

officer shall continue to perform any of the duties of, or hold such office, *unless the surety or sureties be released therefrom, as hereinafter provided.*" Section 12 provides that, "*In no case shall the original be discharged by the filing of an additional or new bond.*" Section 15 provides the manner in which a surety may be released from the obligations of the bond.

There was but one way in which any surety of the first bond could be relieved from his obligation,—viz., by complying with the provisions of section 15, and but one surety was so released. After the release of one surety, the others not desiring to be released, and not availing themselves of the only way provided by statute by which they could be released, were held and bound to the obligations of their bond as fully as they were prior to the release of one of the sureties. No surety can be released except in the manner provided by statute—section 7 above quoted.

Jeffords & Franklin, Herring & Herring, Ben Goodrich, and G. W. Lorain, for Appellees.

It is well established at common law that the release of one surety on a bond without the consent of the other sureties will release them also. Therefore the release of Martin Costello by the board of supervisors without the knowledge or consent of the other sureties discharged all.

The common law on this subject is not changed by the act of March 6, 1883, of the Session Laws of Arizona, p. 158, under which the bond was given.

The case of *People v. Buster*, 11 Cal. 215, is decisive. The court says: "A surety has the right to stand on the precise terms of his contract. He can be held to no other or different contract. In this case, the sureties all contracted together with reference to the common responsibility. In case of a breach or loss, each surety had his recourse for contribution upon his fellows. The discharge of any of the obligors affected the contract as to all. It made it indeed a different contract from that made by the parties."

SLOAN, J.—A motion to dismiss the appeal in this action was made by appellees, upon the ground that there is no assignment of error in the record. The motion must prevail

unless the record shows error upon its face. The record before us consists of the complaint, separate answers of the defendants, and judgment of the court sustaining demurrers and dismissing the action. We will briefly consider the question presented by the pleadings, with a view of ascertaining if there be error in the judgment of the court thereon.

The action was brought by the county of Cochise against A. J. Ritter, and the sureties upon two bonds given by said Ritter, as treasurer and *ex-officio* tax collector of said county. The complaint recites that the defendant was at the November, 1886, election, duly elected to the office of treasurer and *ex-officio* tax collector of said county of Cochise, and thereafter duly qualified and entered upon the duties of said office. That in the month of May, 1887, the official bond given by Ritter, as treasurer and *ex-officio* tax collector, having become insufficient, said Ritter, by an order of the board of supervisors of said county, was required to furnish a new bond with sureties in the sum of one hundred thousand dollars, which order was duly complied with by Ritter. That thereafter, in the month of October, 1887, Martin Costello, one of the sureties upon the last-named bond, withdrew therefrom, and was released from any further obligation as such surety, and said Ritter was by said board required to give an additional bond in the sum for which said Costello was originally bound. That said additional bond was by said Ritter given, and by said board approved and duly filed. The complaint further states that after said additional bond had been given, and while both it and the bond given in May, 1887, were in force and effect, Ritter, in breach of said bonds, unlawfully appropriated to his own use certain sums of money which he had received as such treasurer and *ex-officio* tax collector, and had heretofore failed and refused to replace the same upon lawful demand. Judgment is asked for against Ritter and the sureties upon the last-mentioned bonds. The defendants separately demurred to the complaint, upon the ground that it failed to state a cause of action. The court sustained the demurrers to the complaint as to all the defendants except Ritter, but, the plaintiff declining to amend or to proceed against Ritter separately, and electing to stand upon the complaint, the action was dismissed.

The facts stated in the complaint, although sufficient to maintain the action against the defendant Ritter, showed no cause of action as against the defendant sureties for any defalcation by Ritter subsequent to the withdrawal and the release of Costello from the original bond sued upon, and the demurrer was properly sustained as to them. At common law the release of one surety upon a joint and several bond operates as a discharge of the whole. This rule is adhered to with great strictness, and only when the legislature has clearly ordained otherwise is it departed from. The statute in force at the time the original bond sued upon was given was the act approved March 6, 1883, (Laws 1883, pp. 158, 159, No. 63). So far as it pertains to the subject it reads as follows:—

“Sec. 15. Any surety on the official bond of any officer may be released from any liability thereafter incurred in the following manner, to wit: Such person shall file with the officer authorized by law to approve such official bond a statement in writing, setting forth the desire of said surety to be released from all further liability therefor, which statement shall be signed by the party making the request, and a copy of the statement shall be served on the officer named in such official bond, and due return made thereof.

“Sec. 16. If within ten days after such service is made as required in the preceding section, said officer shall fail, neglect, or refuse to file a new bond, such surety shall be released from any liability incurred by said officer thereafter, and the office shall become vacant, and such vacancy shall be filled by the person or board authorized by law to fill the same upon proof of due service of a copy of such statement.”

It is clear from the reading of these sections that the legislature did not intend that upon the withdrawal of a surety the officer was merely to furnish a bond which should be cumulative or additional to the original bond. He was required in such an event to give, not other or additional surety, but a bond which would take the place of the old one. A failure to give such bond within ten days after notice of the application of any surety for release by the statute worked a vacancy in the office. It cannot be inferred that the legislature intended by this to continue in force the old bond for future

liabilities and to change the common-law rule as to such obligations. We think the case of *People v. Buster*, 11 Cal. 215, in construing a very similar statute, correctly states the rule, and is decisive on that point. Very probably the board of supervisors, when they made the order releasing Costello and approving the additional bond given by Ritter, had in view the act of 1887 (par. 3101, Rev. St. Ariz. 1887), which permitted this to be done without affecting the liability of the other sureties upon the original bond. But it is to be remembered that the statute in force at the time a bond is given becomes part of the contract, as much so as if recited in the bond in precise terms. Any subsequent act of the legislature cannot vary the contract or change the liability or increase the obligation of the sureties without their consent. To hold otherwise would be to hold that the legislature may by act impair the obligation of a contract.

In the absence of any assignment of error, and no error appearing on the face of the record, the judgment of the court below is affirmed.

Kibbey, J., concurs.

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[Civil No. 264. Filed September 3, 1890.]

[73 Pac. 445.]

**JAMES BRASH, Plaintiff and Appellee, v. NICHOLAS WHITE, Defendant and Appellant.**

1. **APPEAL AND ERROR—REVIEW—CONFLICTING EVIDENCE.**—Where there is a substantial conflict in the evidence this court will not disregard the conclusion of the trial court.
2. **IRRIGATION—WRONGFUL DIVERSION—DAMAGES—DEFENSES—TENANCY OR LICENSE TERMINATED BY ADVERSE HOLDING.**—In an action for damages for the wrongful diversion of water from plaintiff's land by defendant it is no defense for defendant to claim as tenant or licensee of plaintiff where it appears that he had terminated his relations with plaintiff by "jumping" the land on which he was as tenant or by license and holding adversely to plaintiff.

**2. APPEAL AND ERROR—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL—**  
REV. STATS. ARIZ. 1887, PAR. 842, CITED.—Failure to save the motion  
for a new trial by a bill of exceptions is fatal to the appeal.

**APPEAL** from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Affirmed.

The facts are stated in the opinion.

Sloan & Stone, and Houghton, Silent & Campbell, for Appellant.

That defendant originally took water from September, 1886, from the plaintiff's ditch with the plaintiff's full consent and under an agreement of some kind, is conceded. That there was no complaint about his taking water until Brash claimed that White had jumped one hundred and sixty acres of his land in the upper part of the valley, is beyond dispute. Now if this arrangement was made in August, 1886, and if it was partially carried into effect by the construction of ditches, and taking the water, it follows that the lease was valid for the term of one year, and that White, as lessee, had a right to the water.

The general rule has been to treat a person in White's position as a tenant from year to year. In either case White was entitled to the water until the expiration of his term.

That part performance of a contract void under the statute of frauds or the doing of acts under it which would be detrimental to the party doing them if the contract should not be carried out, when done with the knowledge and approval of the other party, are good grounds for enforcing parol contracts for land is familiar doctrine. In this case White, on the faith of the water supply, had proceeded to clear some acres of land, and had built his house and put in a crop. It would be grossly inequitable to say that after he had done this he should be liable to be turned out at a moment's notice or be treated as a trespasser.

See Wood on Landlord and Tenant, sec. 205, pp. 284-289; *Arguello v. Edenger*, 10 Cal. 159; *Morrison v. Peay's Executors*, 21 Ark. 112.



G. H. Oury, (Baker & Campbell, of Counsel,) for Appellee.

Where there is a substantial conflict in the evidence in the court below, the judgment will not be disturbed upon the ground that said judgment is contrary to the evidence. *Ehlrich v. Ewald*, 51 Cal. 172; *Gray v. Salt River Valley Canal Co.*, 2 Ariz. 225, 12 Pac. 607.

White only used the water under license from Brash without consideration, which license was revocable at any time. *Morrell v. Mackman*, 24 Mich. 279.

PER CURIAM.—This is an action by the plaintiff against defendant for damages claimed to have been suffered by reason of the defendant cutting an irrigating ditch of plaintiff and diverting water therefrom, thereby injuring the crop of plaintiff. It is insisted by defendant (appellant), first, that there was no substantial damages proven on the trial below. The evidence does disclose the fact that the plaintiff on the trial below testified that White (defendant), without his (plaintiff's) permission, puts dams in the ditch and diverted water from May 11th to June 1st nearly all the time, and that consequently, he lost nearly all his corn, and had a young crop of alfalfa injured; that he had from two hundred and fifty to three hundred acres in alfalfa; that he lost one hundred tons of alfalfa, worth ten dollars per ton in stack, the cost of putting in stack, two and one half dollars per ton; that he lost twenty thousand pounds of grain, and perhaps twenty-five dollars worth of trees.

Several witnesses testified that they saw the crop of plaintiff, and that it looked like it needed water. On the other hand, the defendant's evidence was very strong that there was no substantial damage to plaintiff by reason of anything done by defendant. It may be said the evidence was not as certain in character or as clear in preponderance as to make the question free from difficulty. But the court below, with the witnesses before it, was in a better position to judge of the credibility of witnesses and the weight of the evidence than the appellate court, that had only the record statement of what the evidence was, without the advantage of observing the manner of the witnesses, etc. The conflicting testimony was

weighed, considered, and determined by the trial court, and the rule in such cases is well settled that the appellate court will not disregard the conclusion reached by the trial court. The conflict in the evidence extended to the amount of damage suffered by the plaintiff, as well as the question of damage or no damage. Having examined the record sufficiently to see that there was a substantial conflict, we do not feel called upon to go over the same further than we have done.

It is further claimed by defendant that he was the lessee of water, and not of land and water. Upon this point, also, there was a conflict. It is still further claimed that defendant was tenant of plaintiff, and had a right to take water from his ditch as tenant for the year. Also that, if he was not tenant, he had a license from the plaintiff to do so. If we concede that he was tenant by the year or that he had a license from the plaintiff, his tenancy or his license, whichever it was, he terminated by his own act of "jumping" the land on which he was as tenant or by license. He cannot occupy the position of an adverse and hostile holding, and at the same time that of a tenant or licensee. The conclusions we have reached cover all the material points in the case.

While we have considered the merits of this case, there are objections to the transcript fatal to the appeal. The motion for a new trial was not saved by a bill of exceptions. Rev. Stats. 1887, par. 842.

Judgment below is affirmed.

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[Criminal No. 62. Filed September 3, 1890.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.  
RAMON FLORES, Defendant and Appellant.**

1. **APPEAL AND ERROR—CONFLICT IN EVIDENCE.**—Where there is a conflict in the evidence the appellate court will defer to the conclusion reached by the court below.
2. **SAME—TRANSCRIPT OF THE EVIDENCE—BILL OF EXCEPTIONS—STATEMENT OF FACTS—REV. STATS. ARIZ. 1887, PARS. 1739, 1740, 1744, PENAL CODE, CITED.**—A transcript of the reporter's shorthand

notes filed and approved by the judge fifty-five days after the motion for new trial was overruled cannot be taken either as a bill of exceptions, it not having been presented to the judge for his allowance and signature within ten days after the conclusion of the trial, par. 1739, *supra*, no order for an extension of time appearing of record, par. 1744, *supra*, and it not having been presented to the district attorney as provided by par. 1740, *supra*; or as a statement of facts, the provisions of the law for making up a statement of facts being similar.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Affirmed.

The facts are stated in the opinion.

P. S. Perley, and Henry Steegletz, for Appellant.

Clark Churchill, Attorney-General, and Frank Cox, District Attorney, for Respondent.

PER CURIAM.—The defendant-appellant was found guilty of grand larceny and judgment passed accordingly.

A motion for a new trial was made and grounds alleged as follows: "Because the verdict is contrary to the law and the evidence. Because the court misdirected the jury as to the law." The motion was overruled.

The first objection raises the familiar proposition of law that where there is a conflict in the evidence the appellate court will defer to the conclusion reached by the court below, for the reason that the court below saw the witnesses face to face, took notice of their appearance and demeanor on the stand, and was in better position to weigh the evidence and judge of the credibility of the witnesses than the appellate court, which only knows of the evidence by the cold type.

While the action of the defendant-appellant, taking his own statement as true, was not the conduct and action of a shrewd and cautious criminal, the most casual observer has noticed that the conduct of criminals is often marked by an apparent, if not a real, recklessness wholly abnormal. A criminal is in a certain sense and to a certain degree abnormal, and it is not strange that his conduct should

be like himself. In this case the defendant's action, upon his own statement, was bold and reckless on the theory of his guilt. But we are not without observation where criminals have been equally reckless. But we do not deem it the province of this court in a case of this character to examine and pass upon the weight of the evidence. We have examined it enough to see that there was evidence sufficient to make it the duty of this court to acquiesce in the conclusion of the jury as to the facts in the court below.

The objection to the instruction of the court presents a fine discussion on the meaning of the word "inconsistent." In the light of the evidence, and of the entire case, we do not think it at all probable that the jury were influenced adversely by the instruction, even if the view taken by his counsel of the meaning of the word should be accepted as the correct view. The argument on this point is very ingenious, but we do not think it necessary to enter into that discussion. We think the instructions as a whole presented fairly the law of the case to the jury.

We have thus far considered the case on its merits, and have taken no notice of the defects in the record that are fatal to the appeal under the decisions of this and other courts with statutes similar to ours. We will now call attention to some of these defects, that the bar may become familiar with and observe what are held to be the essential requirements of the law.

There appears in the transcript—not in the record—a paper entitled of the court and cause and beginning with these words, viz.: "Transcript of shorthand notes of the testimony, etc., taken upon the trial of the above-entitled cause, at . . ." etc. Then follows what purports to be testimony of witnesses in the case. This paper has filing-mark January 10, 1889, probably intended for January 10, 1890. At the bottom of this paper are these words: "Approved this 15th January, 1890," and signed by the judge. The judgment was rendered on the sixteenth day of November, 1889. Motion for a new trial was made and overruled same day. This "approval" of this paper was then about fifty-five days after motion for new trial was overruled. To be available, this paper must be either a bill of exceptions or a statement of facts. If a bill

of exceptions it should have been presented to the judge for his allowance and signature within ten days after the conclusion of the trial unless further time was granted. (Rev. Stats. Ariz., 1887, par. 1739, Pen. Code.) The statute provides (Rev. Stats. Ariz. 1887, par. 1744, Pen. Code): "The court or judge thereof may by order extend the time for making up, signing, approving, or filing any bill of exceptions in a criminal action." There is no order extending the time, and nothing to show any presentation within the ten days. Are we to infer, or should the record show, a compliance with the law? Our inference might be a mistake. The record should, in our opinion, show that the requirements of the statute have been complied with. If a mere "approval" of a paper purporting to be testimony of witnesses fifty-five days after the conclusion of the trial is sufficient, of what use is the statute? Why provide by statute that a thing must be done in fifty-five days? Why provide that, if more than ten days is thought necessary that the court or judge may extend the time by an order, if the time may be extended indefinitely without an order? We think the bill must be presented within ten days, and not afterwards, unless the time has been extended, and this extension must be by order. Any other construction would change the language, and, as we think, the meaning of the statute. We conclude this paper is not a bill of exceptions. If this paper was intended as a bill of exceptions, and presented to the judge as such, it should have been presented by the judge to the district attorney (Rev. Stats. Ariz. 1887, par. 1740, Pen. Code).

Is this paper a statement of facts? The provisions of the law for making up a statement of facts are very similar to the provisions for a bill of exceptions. We deem it unnecessary to repeat the provisions. Time is to be extended by order of the court or judge, as in the case of a bill of exceptions. No order is here. If the paper is to be considered as a statement of facts, it should state that it contains all the facts admitted and the facts admitted to have been proven and the evidence of the facts disputed. No such statement is contained therein. We conclude this is not good as a statement of facts.

Without a bill of exceptions, and without a statement of

facts, upon what basis could we predicate error in the instructions—even if there should appear to be error therein? But we do not think that error does appear, even if the paper should be considered.

The judgment is affirmed.

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[Civil No. 273. Filed September 3, 1890.]

[73 Pac. 443.]

LEMON & McCABE, Plaintiffs and Appellees, v. CHARLES WARD, Administrator of the Estate of A. A. Ward, Deceased, et al., Defendants and Appellants.

1. JURY TRIAL—RIGHT TO DEMAND IN LAW CASES—POWER OF LEGISLATURE TO FIX REASONABLE TIME FOR DEMAND.—The right to trial by jury in law cases is one sacredly to be observed. It is competent for the legislature to fix the time within which the demand shall be made, if it be a reasonable time.
2. SAME—DEMAND—WHEN MADE—REV. STATS. ARIZ. 1887, PAR. 757, CITED—APPEAL AND ERROR—RECORD—MUST SHOW ERROR CLEARLY—PRESUMPTION.—When a case has been dismissed on appellant's motion after his demand and deposit for a jury and is reinstated after some two months and a new demand and deposit for a jury trial is made just before trial it is not error for the trial court to refuse a jury, the second demand not having been made in apt time and the record not showing that the first demand and deposit continued in force up to the time of trial. It is incumbent on the appellant to make a clear case of error and if the record is obscure or ambiguous the presumption is in favor of the correctness of the ruling of the trial court.
3. APPEAL AND ERROR—STATEMENT OF FACTS—TIME FOR FILING—REV. STATS. ARIZ. 1887, PAR. 843, 845, CITED.—Where it appears that the statement of facts is filed after the term, and there is no order entered of record extending the time for filing, it will be stricken out on motion.
4. SAME—RECORD—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL—ASSIGNMENT OF ERROR—PUTNAM v. PUTNAM, ANTE, P. 182, 24 PAC. 323, CITED AND APPROVED.—Where it does not appear that a motion for a new trial was made part of the record by bill of exceptions

and the order of the trial court in overruling the motion for a new trial is not assigned as error this court cannot consider any error which would have been good cause for a new trial.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Affirmed.

The facts are stated in the opinion.

L. H. Chalmers, for Appellants.

P. S. Perley, for Appellees.

There appears no order of court entered of record during the term the case was tried authorizing the statement to be made up, signed, and filed in vacation. The statute of Texas and ours are exactly alike except the number of days given for filing the statement of facts. Where the statement of facts is not filed within term time the appellate court will disregard it when filed in vacation, unless there appears upon the record an order made by the court in term time allowing it so to be filed. *Ross v. McGowen*, 58 Tex. 603; *Trewitt v. Blendell*, 59 Tex. 253; *J. and P. Ry. Co. v. McAlister*, 59 Tex. 350; *Lockett v. Schurenbury*, 60 Tex. 610.

PER CURIAM.—In this case the appellees recovered judgment against the appellants in the sum of one hundred and fifty dollars, interest and costs. There are four errors assigned: 1. That the court erred in not allowing the defendants a trial by jury; 2. That the court erred in not admitting evidence excepted to at the time; 3. That the court erred in giving judgment for plaintiffs, the plaintiffs not having a preponderance of the evidence; and 4. That the court erred in not granting a continuance.

We will now consider the error first assigned,—viz., that the court erred in not allowing the defendants a trial by jury. The record discloses the facts that the defendants did demand a jury, and deposited the jury fee. But it also appears that after the demand for a jury, which was on November 11, 1887, the defendants moved the court, on the twenty-fourth day of January, 1888, to dismiss the suit of plaintiffs for want of

prosecution, and it was so dismissed; that at the next term, May 8, 1888, the cause was reinstated and continued for the term; that the second term after the demand and deposit the case was set down for trial March 4, 1889. The cause came on for trial the next day, March 5, 1889, at which time by the record, "L. H. Chalmers deposited \$24, jury fees, and called for a jury, which was refused by the court, and the defendant excepted." The right of trial by jury in law cases is one sacredly to be observed. But it is competent for the legislature to fix the time within which this demand shall be made, if it be a reasonable time. When the docket is called, is the time fixed by the statute (Rev. Stats. Ariz. 1887, par. 757) for the litigant to make his demand. This last demand and deposit was not made at the time so fixed by law, and appellants do not so claim, but do claim that the first demand and deposit continued in force up to the time of trial and this is the question we are to consider. It is claimed by appellees that the demand and deposit was only good for the term when made. This we need not decide. After the demand and deposits defendants below, on their own motion, had the cause dismissed for want of prosecution. The demand was on November 11, 1887. The cause was dismissed January 28, 1888. At the next term, on May 8, 1888, it was reinstated—the second term after the demand and deposit. On February 19, 1889, the cause was set down for trial on March 4, 1889. Before going into trial, as above set forth, defendants demanded a jury, and deposited the fee. Now, does it appear from these facts that the defendants were within the requirements of the statute? If the case had continued without interruption from time of demand to time of trial, and the appellants had then insisted on their right to a jury trial by reason of their first demand, the record would present a different question, in our opinion, from the one now presented. True, the record does not expressly say that the money on deposit for jury fee had been withdrawn, nor the demand; nor does the record expressly show that the demand and deposit continued. On this point it would be more satisfactory if the record was more explicit. It is incumbent on the appellant to make the record show a clear case of error on the part of the trial court, and, if the record brought up



from below is obscure or ambiguous, the presumptions indulged in favor of a correct ruling by the court below are apt to decide the case against the appellant. This record shows that the cause of plaintiffs was dismissed, on motion of appellants, on January 28th, and only reinstated on May 8th following. For more than two months the cause stood dismissed. Is it likely that the deposit fee remained on deposit during these two months? Why should it, if the case was dismissed? If withdrawn the withdrawal was also a withdrawal of the demand, for the two go together. Again, before going into trial, the defendants (appellants), apparently not relying on their first demand and deposit, made a new demand and deposit, not insisting or claiming a right to a jury on the demand and deposit first made. The fact that defendants (appellants) did deposit the jury fee just before the trial, we think, is inconsistent with the idea that there was already a jury fee on deposit. If the jury fee had been withdrawn when the suit was dismissed, it should have been restored when the suit was reinstated. We think it apparent from the transcript that the court did not err in refusing the trial by jury; the demand for the same not appearing by the record to have been made and in force at the time of the trial, in compliance with the law.

We have considered this question without regard to the question raised by the motion to strike out the statement of facts. We have done so partly that the statute may have a construction known to the bar, to serve as a guide whenever the question may come up in the practice. It is more pleasant to decide a case on its merits than on a question arising on the transcript. But we cannot disregard the requirements of the statute, made to be observed in cases presented to this court. We are fully aware that the statute is new and not entirely clear, and for that reason we are inclined to consider the merits, unless our attention is called to a material defect in the record.

The appellees move the court to strike out the statement of facts for the reason that the record shows the same was not filed during the term of court, nor any order made of record for filing thereafter. The case was tried below on the eighth day of March, 1889. The term ended May 6, 1889.

The statement of facts was filed May 8, 1889. There is no order of record authorizing the statement to be filed after the close of the term. The statute is quite clear that the statement of facts must be made up and filed during the term, or an order must be entered of record extending the time, and then not more than thirty days beyond the term, (Rev. Stats. Ariz. 1887, pars. 843, 845.) The Texas statute is identical with our own, except ten days after the term is the extension in that state, and thirty days the limit in this territory. In that state it has been held that, if the statement was not filed in the time fixed by the statute, it would, on motion, be stricken from the record, and that no certificate of the judge or agreement of the parties as to the facts would operate to avoid the statute. *McGuire v. Newbill*, 58 Tex. 314; *Ross v. McGowen*, 58 Tex. 603; *Trewitt v. Blundell*, 59 Tex. 253; *Lockett v. Schurenberg*, 60 Tex. 610. The California cases cited by appellants do not cover the case, in our opinion. Again, it does not appear by the record that a motion for a new trial was made part of the record by bill of exceptions. In *Putnam v. Putnam* (recently decided by this court), *ante*, p. 182, 24 Pac. 323, it is said: "This court cannot consider any error which would be good cause for new trial, unless a motion for a new trial on that ground had been made to the court below, and the motion had been overruled, and the ruling excepted to, and the motion embodied in a bill of exceptions, and the ruling assigned as error by a proper assignment." In this case the motion for a new trial is not in the record by a bill of exception, as the law requires, nor is there assigned as error the order of the court overruling the motion for a new trial. But if the statement of facts remained in the record, to be considered by this court, and the record was properly before us, we would still hold that the errors assigned could not be sustained in this court on the face of the entire record.

Judgment below is affirmed.

[Civil No. 302. Filed September 3, 1890.]

[28 Pac. 960, *sub nom.* Newmark *et al.* v. Marks.]

SARAH MARKS, Plaintiff and Appellee, v. M. A. NEWMARK *et al.*, Defendants and Appellants.

1. **APPEAL AND ERROR—RECORD—RULINGS ON EVIDENCE—STATEMENT OF FACTS.**—This court will not review rulings upon introduction of evidence where the statement of facts is not presented to the trial judge for allowance within the time prescribed for bills of exceptions.
2. **SAME—SAME—SAME—BILL OF EXCEPTIONS—NECESSITY FOR.**—Nor can it consider error alleged in the exclusion of evidence where there is no bill of exceptions preserved to the ruling complained of.
3. **SAME—ASSIGNMENTS OF ERROR—MUST BE SPECIFIC.**—An assignment that "the court erred in giving judgment for the plaintiff instead of defendants," is too general for consideration on appeal. Error must be pointed out specifically.
4. **SAME—SAME—ERROR IN OVERRULING MOTION FOR NEW TRIAL—REFERENCE TO MOTION INSUFFICIENT.**—An assignment of error that "the court erred in not granting defendants a new trial on grounds set forth in their motion for the same" is not sufficient, inasmuch as an inspection of the motion shows that, in addition to errors elsewhere assigned, it alleges the court erred "because the judgment is contrary to the law and against the weight of the evidence." It is not stated wherein the judgment is contrary to law.
5. **SAME—SAME—REVIEW—EXTENT OF.**—Under this specification the court may only examine the record to find whether the judgment follows the pleadings.
6. **SAME—REVIEW—JUDGMENT WILL NOT BE DISTURBED WHERE THERE IS EVIDENCE TO SUPPORT IT.**—It is for the trial court to determine the weight of the evidence. Its findings are not erroneous where there is evidence to support them.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge. Affirmed.

The facts are stated in the opinion.

H. N. Alexander, and H. B. Lighthizer, for Appellants.

Goodrich & Street, for Appellee.

SLOAN, J.—This is an action to enjoin the sale of certain real estate situated in the city of Phoenix, under an execution issued upon a judgment recovered by appellants herein against Simon Marks, the husband of appellee. The property in question was conveyed by Guss Ellis & Co., in 1886, to the appellee, Sarah Marks, for a money consideration expressed in the deed. At the time of the conveyance appellee's husband, Simon Marks, the defendant in the execution proceeding, was engaged in the mercantile business in said city of Phoenix. Subsequently he failed, and on the twenty-fourth day of May, 1887, appellants obtained judgment against him, upon which execution was duly issued and placed in the hands of the sheriff, and by him levied upon said real estate. Whereupon plaintiff brought this suit, claiming said property to be her separate estate, and not subject to the debts of her husband, and asking for a perpetual injunction staying the sale under execution. The court below found for the plaintiff, and granted a perpetual injunction restraining the appellants from in any manner proceeding against said real estate in satisfaction of said judgment against her said husband, Simon Marks. Appellants moved for a new trial, which was denied, and from this ruling this appeal is brought.

The first two assignments of error relied upon by appellants as grounds for a reversal of the judgment of the court below are as follows: 1. "That the court erred in admitting irrelevant, incompetent, and hearsay evidence on the part of the plaintiff, as disclosed by the statement of facts;" and 2. "That the court erred in excluding as evidence the proceedings supplementary to execution in the case of *Newmark v. Marks*, including report of referee, and the order of court affirming same, offered by the defendants." The first assignment invites us to a search through the record for the purpose of discovering errors committed by the court in its rulings upon the introduction of evidence in the trial of the case below, and particularly that part of the record which is contained in the statement of facts. While we might possibly have been disposed to perform this labor for counsel, we cannot in this instance examine the statement of facts for any such purpose, inasmuch as it lacks the character of a

bill of exceptions in one essential particular, viz., in that it was not presented to the trial judge for his allowance within the time prescribed by statute for bills of exception. *Putnam v. Putnam*, ante, p. 182, 24 Pac. 321. Nor can we consider the second assignment, inasmuch as no bill of exceptions was preserved to the ruling of the court complained of.

The third assignment is altogether too general in its character for consideration. Appellants should have specifically pointed out wherein "the court erred in giving judgment for the plaintiff instead of the defendants."

Nor does the fourth and last assignment, which reads as follows: "The court erred in not granting defendants a new trial on grounds set forth in their motion for the same,"—meet the requirement of a proper assignment of error, inasmuch as it simply refers us to the ruling of the court upon the motion for a new trial, and an inspection of the motion shows that, in addition to the errors complained of in the other assignments, it is therein alleged that the court erred "because the judgment is contrary to the law and against the weight of evidence." It is not stated wherein the judgment is contrary to law.

We find, however, from an inspection of the record that the judgment follows the pleadings, and that is as far as we may examine the record under this specification.

As to the weight of the evidence, that was a matter for the trial court to determine. In his judgment the evidence was sufficient to establish the claim of the respondent that the property in controversy was her separate property, and we see nothing in the statement of facts showing fundamental error in this finding of the court, as there is evidence to support it.

The judgment is affirmed.

Gooding, C. J., and Kibbey, J., concur.

ON MOTION FOR REHEARING.

(January 26, 1892.)

PER CURIAM.—Action to enjoin sale of certain real estate situate in the city of Phoenix, in this territory, under an execution issued upon a judgment recovered by appellants

against Simon Marks, the husband of the appellee. The case was decided in this court on the third day of September, 1890, and judgment of affirmance rendered on that day. Petition for rehearing was made and filed on the eighteenth day of the same month. We have looked into the record with the purpose of examining the whole case. Without discussing in detail the points raised by the motion for a new trial, and covered by the assignment of errors, we arrive at the conclusion that a different result would not be reached by a further consideration of the case, and see no reason why the judgment of affirmance heretofore rendered should be set aside. A rehearing is therefore denied.

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[Civil No. 274. Filed September 3, 1890.]

[32 Pac. 266, *sub. nom.* Richards v. Green.]

NAT. W. GREER (substituted for J. T. Lesueur), Treasurer and Ex-officio Tax Collector of the County of Apache, Plaintiff and Appellee, v. HUGO RICHARDS et al., Defendants and Appellants.

1. APPEAL AND ERROR—MOTION FOR NEW TRIAL—NECESSITY FOR REVIEW OF EVIDENCE—PUTNAM v. PUTNAM, ANTE, P. 182, 24 PAC. 320, FOLLOWED.—Error in admission of evidence is good ground for a new trial and it not appearing from the record that any motion for new trial was made in the court below that alleged error is not before us for consideration. *Putnam v. Putnam, supra*, followed.
2. COURTS—UNITED STATES SUPREME COURT—DECISIONS BINDING ON TERRITORIAL COURTS—CONSTRUCTION OF LOCAL STATUTES.—The territorial courts are completely subordinate to the United States Supreme Court. It is the court of final resort, and its decisions are binding and conclusive upon this court in the construction of our local statutes as well as in other cases.
3. INJUNCTIONS—BOND—DAMAGES—COUNSEL FEES—COMP. LAWS ARIZ. 1877, SECS. 2544-2555, CITED AND CONSTRUED.—Counsel fees are not recoverable upon an injunction bond conditioned, as provided by statutes, *supra*, that the plaintiff will pay such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled to the injunction.

4. TAXES—INTEREST.—Taxes do not bear interest unless imposed by statute.
5. PLEADING—EVIDENCE—RELEVANCY—VARIANCE.—In an action upon an injunction bond evidence that the damages was interest on an indebtedness incurred by reason of deprivation of taxes is not permissible under a pleading alleging damages as interest on taxes enjoined.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Reversed.

Wm. G. Hazledine, Solicitor, (E. M. Sanford, J. A. Williamson, of Counsel,) for Appellant.

The decisions of the supreme court of the United States are final and binding upon the territorial courts. The supreme court of the United States has held that counsel fees must not be allowed as part of the damages recoverable upon an injunction bond. *Oelricks v. Spain*, 15 Wall. 211. Whatever the holding may be in the various states of the Union, this decision of the supreme court settles the question for this territory.

The second proposition, that interest cannot be recovered, is also sound and fully sustained by the authorities. It will be conceded that interest can only be recovered on the strength of a contract to pay interest, or by statutory authority. That there was no contract is apparent from the complaint; that there was no statutory authority is evidenced by the law. Desty on Taxation says that taxes are not debts but obligations created by legislative authority, to which the personal consent or individual assent of the party charged is not required. They are not debts so as to be a proper subject of set-off, and cannot, as a general rule, be recovered in a common-law action as a debt. They do not bear interest, except when expressly so provided for by statute, and are not assignable. See Desty on Taxation, p. 9.

A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract and does not establish the relation of debtor and creditor between the taxpayer and the state. See *Perry v. Washburn*, 20 Cal. 318; *Ormsby v. Louisville*, 79 Ky. 202; *Louisville etc. R. R.*

*Co. v. Hopkins*, 87 Ky. 605, 9 S. W. 497; *Homer v. Kirkwood*, 25 Miss. 95; *State v. Winona and St. Paul Land Co.*, 39 Minn. 380, 40 N. W. 166.

Baldwin & Johnson, for Appellee.

KIBBEY, J.—On the fifth day of February, 1886, the Atlantic and Pacific Railroad Company, upon proper complaint, obtained in the district court for the third district a temporary injunction restraining the treasurer of Apache County from selling certain lands and the improvements thereon, and the culverts, bridges, grading, rock and earth cuts and fills, etc., property of the said railroad company then advertised by said treasurer for sale for the payment of taxes assessed and levied against said railroad company. On said day said railroad company caused to be executed a bond, with Hugo Richards and Edwards Wells, the appellants herein, as sureties, in the sum of \$9,732, conditioned for the payment to said treasurer of such damages as he might sustain by reason of said injunction, if the court should finally decide that said railroad company was not entitled thereto. On the ninth day of June, 1887, a motion to dissolve the temporary injunction was denied. On the 10th of November, 1887, after a trial upon the merits, the injunction was dissolved, and the complaint dismissed. The railroad company thereafter appealed from that judgment to this court, and the appeal was there, by the appellant, dismissed. See *Railroad Co. v. Lesueur*, 2 Ariz. 428, 19 Pac. 157. This action is for the recovery on the injunction bond of the damages sustained by said treasurer by reason of the injunction. Appellee alleged in his complaint that by reason of the injunction he was prevented from collecting taxes amounting to \$9,171.44, and penalty and costs amounting to \$560, from the ninth day of February, 1886, until the twenty-sixth day of January, 1888, and that his damages occasioned thereby are \$1,863, interest on said taxes and penalties, and the further sum of \$1,680, expended as attorneys' fees in obtaining the dissolution of said injunction, and \$400 expended in procuring the attendance and testimony of witnesses in and about the obtaining of the dissolution of the injunction. The



appellants demurred to the complaint,—1. Because appellee was not entitled to recover attorneys' fees as a part of his damages; and 2. That the appellee was not entitled to recover interest on taxes, penalties, and costs. The demurrer was overruled. There was a trial, and judgment for appellee for the sum of \$209.89 and costs of suit, from which this appeal is taken. The overruling of the demurrer and the admission of certain evidence at the trial are assigned as errors.

As the error in admitting evidence, if error it was, was good ground for a new trial, and it not appearing from the record before us that any motion for a new trial was made in the court below, for that or any other cause, that alleged error is not before us for consideration. *Putnam v. Putnam*, ante, p. 182, 24 Pac. 320.

The only question properly presented for our consideration is the correctness of the ruling of the court upon the demurrer to the complaint. The statute upon the subject of injunctions, in force at the time the bond in suit was executed, was copied from the statute of California. Comp. Laws Ariz. 1877, secs. 2547-2555; Code Cal. (Hittell), secs. 10525-10533. It is by that statute prescribed that the undertaking shall be conditioned "to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled" to the injunction. Substantially similar provisions are found in the statutes of nearly all the states and territories. It is conceded by appellants that it is held by the courts in a very large number of states that counsel fees may be allowed in suits upon injunctions under statutes similar to our own; but they contend that we are bound by the decisions of the supreme court of the United States, and cite *Oelricks v. Spain*, 15 Wall. 211, where that court denies the right to recover counsel fees as part of the damages in such a suit. We do not entertain any doubt but that, had the statute provided that attorneys' fees incurred by the defendant in procuring the dissolution of a temporary injunction should be an element of damage recoverable in a suit on the bond, such provision would have been valid. But the

statute has failed to do so, and we are left to determine the question by reference to the analogies of the law and a consideration of sound public policy; and in this, inasmuch as this court has never passed upon the question, we are to be guided largely by the declarations of other courts. As we have said, the preponderance of authority in the state courts is that counsel fees are recoverable in a suit upon an injunction bond in a case like this. But the weight we may attach to the decisions of different courts as authority depends to a considerable degree upon the relation in which we stand to these courts. By virtue of the provision in the constitution of the United States that Congress may make needful rules and regulations respecting the territory of the United States, (Const., art. 4, sec. 3, subd. 2,) or that that power is incident to the right to acquire territory, Congress has undertaken to provide for the government of the territories (*Insurance Co. v. Canter*, 1 Pet. 511; *Clinton v. Englebrecht*, 13 Wall. 434-447; *Nelson v. United States*, 30 Fed. 112). The theory upon which the governments of the various territories have been organized has been to leave to the inhabitants all powers of self-government consistent with the supremacy of national authority, and within the limits prescribed by the organic acts. *Clinton v. Englebrecht*, 13 Wall. 434. By the organic act of Arizona the legislative power extends to all rightful subjects of legislation not inconsistent with the laws and constitution of the United States. Rev. Stats. U. S., sec. 1851. It is provided that the supreme court of the territory shall consist of the chief justice and two associate justices, to be nominated by the President; that the territory shall be divided into three districts, and a district court shall be held in each district by one of the supreme judges. By section 1908 the judicial power in Arizona is vested in a supreme court and such inferior courts as the legislative council may by law prescribe. These courts are in no sense United States courts, although there is vested in the district courts of the territories the exercise, in all cases arising under the constitution and laws of the United States, of the same jurisdiction as is vested in the circuit courts of the United States. *Clinton v. Englebrecht*, 13 Wall. 434-447; *Good v. Martin*, 95 U. S. 98; *Reynolds v. United States*, 98 U. S. 154; *Ex parte Harding*,

120 U. S. 782, 7 Sup. Ct. Rep. 780. It is, however, provided by the organic act that writs of error and appeals from the final decision of the supreme court of this territory to the supreme court of the United States, shall be allowed where the amount in dispute, exclusive of costs, shall exceed the sum of five thousand dollars; and this not only in cases arising under the constitution and laws of the United States, but those arising under the local laws of the territory. And herein is a very plain, and we think important, distinction to be observed between the relation of the courts of the territories to the supreme court of the United States, and the relation of the state courts to that court. The state courts are subordinate to the supreme court of the United States only in cases involving federal questions, and not in those involving only local questions. The territorial courts are completely subordinate to the United States supreme court. It is the court of final resort, and its decisions are binding and conclusive upon us. The supreme court of the territory is really but an intermediate appellate court, and this is in pursuance of the theory that the governments of territories shall always be subject to the supervision of the national authority.

It is argued that the supreme court of the United States, in construing the local laws or statutes of the states, have almost universally adopted their construction given by the state courts, and that, therefore, if this court should determine the question before us, the supreme court of the United States would adopt our determination, notwithstanding they have held otherwise in another case. This we believe is the rule with reference to the construction of state laws, and it follows naturally from the relation existing between the state courts and the federal courts. The states have a right to determine what the rights of their citizens shall be among themselves, subject only to the limited sovereignty of the national government; and it would be a strange doctrine if the federal courts should, as between the citizens of one state and those of another within the territorial limits of the latter, by its judgment, accord to the former greater or different rights, as against such citizen, than a citizen of the state might have. The federal courts have no supervisory power over the local administration of justice in the states; and

that different rights may not flow from the same transaction, depending simply upon a difference in the tribunal where it is sought to enforce them, the federal court should, and they have, whenever called upon to enforce rights depending upon local laws, adopted and followed the construction given them by the state courts. They adopt not only the construction placed by the local courts upon local statutes, but also the declarations of those courts as to the common law. As we have said, the supreme court of the United States cannot review the decisions of the state courts upon matters of purely local concern, arising under local laws. But our organic act confers upon every citizen of this territory the right of appeal, first to the territorial supreme court, and thence to the supreme court of the United States. To say that that court will be bound by the decisions of this court upon matters involving the construction of local laws is simply to divest the right of appeal of any benefit to the appellant. To argue that a litigant may appeal from this court to the supreme court of the United States, and then that that court will adopt the construction placed by this court on the law involved, and therefore affirm the judgment, is, it seems to us, an absurdity. This is a condition that cannot arise between the state and federal courts. It is a condition expressly created by Congress to enable the national government to retain and exercise its supervisory control. These cases, then, cited by appellee to the effect that the supreme court of the United States will adopt the construction of the local laws of the states placed thereon by the courts of the states are not pertinent to the question before us. Appellee cites *Good v. Martin*, 95 U. S. 98, in support of the theory that that court will adopt the construction of the territorial courts. But no question of construction was involved in that case. The question was as to the power of the territorial government to make a different rule as to the competency of witnesses than that prevailing in the courts of the United States, and the court says that such power existed, and was exercised. And so in *Reynolds v. United States*, 98 U. S. 154, it was not a question of adherence to the construction of certain laws by the territorial court. It was whether grand juries were to be impaneled under the provisions of the territorial or

the United States statutes. And in *Hornbuckle v. Toombs*, 18 Wall. 648, the question was not one of construction, but of power of the territorial legislature to blend common law and equitable jurisdiction and procedure in the courts of the territory. And in *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. Rep. 780, it was decided that an alien was a competent grand juror because a statute of the territory made him so. It was not a question of adherence to a construction placed on a law by the territorial court. While we concede to the courts of California, Missouri, New York, Iowa, Indiana, Louisiana, etc., the greatest respect, we are bound by *Oelricks v. Spain*, 15 Wall. 211. The demurrer should have been sustained, and the item for attorneys' fees stricken out.

We next come to the consideration of the allowance of interest on the amount of tax due for the time the county was deprived thereof. We are relieved of much labor by the concessions of counsel for appellee. It is conceded by appellee that taxes do not bear interest unless imposed by statute, and the statute under which the taxes in dispute were levied made no such imposition. The allegation of the complaint is "that this plaintiff, as such treasurer and *ex-officio* tax collector, and in his official capacity as such, has by reason of the said injunction sustained damages in the following sums, to wit: \$1,863, interest on said taxes, and penalty and costs, from the ninth day of February, 1886, till the twenty-sixth day of January, 1889; \$1,860, . . . attorney fees; . . . and \$400 expended in securing the attendance and testimony of witnesses; . . . and these are all the items of damages alleged. On that the court, in its finding, assesses damages . . . in the further sum of \$1,702.89, as damages for and on account of interest on the taxes enjoined." And this in the face of appellee's concession in his brief that "we instantly admit that taxes do not bear interest, and, as the question is so clear that its very simplicity banishes argument, we immediately flee from appellants' offer to discuss it." It is argued by appellee that the damages allowed by the court below, and designated by the court as "interest on the taxes enjoined," were not really so, but was the interest on the indebtedness of the territory and county incurred by reason of their deprivation of the sum due as taxes. It is

enough to say that under the pleadings evidence to sustain such a view was not permissible, and the finding of the court below indicates that such was not the theory on which the case was tried. The demurrer on the ground that taxes do not bear interest should have been sustained and that allegation stricken out. 1 *Desty on Taxation*, p. 9; *Ormsby v. Louisville*, 79 Ky. 202; *Railroad Co. v. Hopkins Co.*, 87 Ky. 605, 9 S. W. 497. For the errors in the record we have noted, the case must be reversed, and the district court is directed to sustain the demurrer to the complaint.

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[Civil No. 283. Filed September 3, 1890.]

[73 Pac. 446.]

SAMUEL C. REES, Plaintiff and Appellant, v. WILLIAM R. RHODES, Defendant and Appellee.

1. ACTIONS—PROCEDURE—NO DISTINCTION BETWEEN “EQUITY” AND “LAW”—CIVIL SUITS—REV. STATS. ARIZ. 1887, PARS. 649, 668, 734, CITED—RIGHT TO TRIAL BY JURY—VERDICT—NOT ADVISORY.—There is no distinction in procedure between “equity” and “law” under the statutes of this territory. All proceedings in courts of justice whereby a civil remedy for a civil wrong is sought, except in some special proceedings, are denominated civil suits. Statutes, *supra*, cited. Under our statutes parties to a civil suit, unless otherwise provided, are entitled to a trial by jury, and their verdict is not in any sense advisory—the judgment of the court must follow it, or the judge must set it aside as erroneous and order a new trial.
2. MORTGAGES—ACTION TO DECLARE DEED MORTGAGE—PAYMENT OR TENDER NOT REQUIRED.—In an action to declare a deed absolute on its face a mortgage, prior payment or tender of the amount of the indebtedness is not required.
3. SAME — SAME — EVIDENCE — UNSATISFIED JUDGMENT.—A judgment against plaintiff, assigned to defendant prior to the execution of a deed from plaintiff to defendant, and still unsatisfied, is admissible, in an action to declare the deed a mortgage, for the purpose of showing the relation of the parties.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Reversed.

The facts are stated in the opinion.

Herndon & Hawkins, for Appellant.

The appellant alleged in his complaint that he was indebted to appellee in the sum of \$4,450, and that in order to secure the same he made to the appellee the deed set out in the complaint, and that at the *same time* appellant made under seal and delivered to the plaintiff a written instrument in the nature of, or which operated as, a defeasance.

The trial judge erred in ruling that plaintiff could not prove that he was indebted, by any legal obligation, to defendant. Appellant offered to show that a judgment had been duly rendered against the plaintiff; that such judgment was and is valid, subsisting, unpaid, and unsatisfied; that defendant purchased such judgment and was and is the owner thereof; that to secure this the deed was made by plaintiff to defendant, and the defeasance executed by defendant to plaintiff. All this evidence was excluded by the court.

If the defendant owned the judgment and held the same against plaintiff, and that judgment had never been paid or satisfied, and was still in force, it was proper that plaintiff should make this showing.

The defendant was afterwards permitted to testify that the debt was paid. The unsatisfied judgment on the records was better proof of this fact than defendant's mere statement; especially as Rees, the plaintiff, testified that the same had never been paid and that the very purpose of the deed and defeasance was to secure and not to pay the same.

The question to be settled was whether there was a pre-existing debt, and also whether the intention of the parties was to cancel the debt or to secure it. The judgment, if subsisting and owned by the defendant, would show a pre-existing debt, and the further fact that the evidence of the indebtedness is retained or not cancelled by defendant after the conveyance would be strong proof that the conveyance was taken merely as security. Jones on Mortgages, vol. 1, sec. 326.

In the case of *Ennor v. Thompson*, 46 Ill. 223, 224, the court says: "That the retaining the evidence of the indebtedness, after receiving a deed absolute in terms of the mortgaged

premises giving back a lease to the grantor and receiving rents, characterize the transaction a mortgage." To the same effect, see *Sutphen v. Cushman*, 35 Ill. 186.

Baldwin & Johnston, for Appellee.

Appellant should pay or tender the amount of the indebtedness before being permitted to maintain this action. The supreme court of California says: "The money having become due, it was incumbent on the defendant, if he desired to have the court declare that in equity the transaction constituted a mortgage, to offer to redeem. He cannot demand equitable relief in respect to the contract, while failing to perform his part of it. He should do equity by offering to redeem when seeking equity by having the deed declared a mortgage. There is no shadow of doubt in my mind that equity requires the defendant to pay or tender the amount loaned before he deprives the plaintiff of the right of possession, which flows from the deed and lease, and the expiration of the term." *Hughes v. Davis*, 40 Cal. 120.

KIBBEY, J.—Appellant denominates this a "suit in equity" to declare a deed absolute upon its face, and a defeasance given by appellee to appellant simultaneously with the delivery of the deed, a mortgage.

It appears from the record that the issues of facts in the cause were submitted to a jury that their verdict might be "advisory" to the court. As we have no courts of equity nor of law in this territory, and as the legislature has for a long time strenuously sought to abolish the distinction in procedure between "equity" and "law," the courts and the bar should dismiss from their minds the idea of "suits in equity" or "actions at law," so far as they tend to preserve that distinction. Our statute denominates all proceedings in courts of justice whereby a civil remedy for a wrong is sought, except in some special proceedings, civil suits. The courts and bar have clung so tenaciously to the observance of the distinction that in many instances the plain administration of justice has been thwarted. Our statutes (Rev. Stats. 1887) say that civil suits shall be begun by filing a complaint in the office of the clerk of the proper court (par. 649), and that the complaint



shall set forth a full and clear statement of the cause of action without any distinction between suits at law and in equity (par. 668), and that the defendant may plead as many several matters, whether of law or of fact, as may be necessary for his defense (par. 734). To ascertain the rights of parties litigant, we look to the statutes or to the rules laid down by the courts of law, but for the enforcement of those rights we ignore the source of the rights and proceed under the statute. And under our statutes parties to a civil suit, unless otherwise provided, are entitled to a trial by jury, and their verdict is not in any sense advisory—the judgment of the court must follow it, or the judge must set it aside as erroneous and order a new trial. This, then, is a civil suit to declare a deed absolute on its face a mortgage.

It is alleged in the complaint that on the twenty-sixth day of February, 1887, the appellant was indebted to the appellee in the sum of \$4,450; that, to secure the payment of the same, appellant executed and delivered to appellee a deed, absolute and unconditional on its face, conveying to him the estate therein described; that, at the time of the execution and delivery of such deed, the appellee executed and delivered to appellant a written agreement, whereby, after reciting the conveyance before mentioned and the agreement of appellee to reconvey to appellant, appellee covenants and agrees that if appellant shall pay him, within twelve months after the date of the instrument, the sum of \$4,450, and the interest at the rate of one and one-half per cent per month, appellee will make and deliver to appellant a deed reconveying the premises to appellant, but that on failure to make such payment the covenant and agreement shall be of no further effect; that on the first day of December, 1887, appellant paid appellee \$801 on said indebtedness and on the twenty-sixth day of December, 1887, \$1,000, and other payments in machinery, implements, pasturage, rent, and hay, sums aggregating \$1,000, making a total payment on said indebtedness of \$2,850, leaving a balance due appellee of \$2,898.63; that on January 7, 1888, appellant was ready and willing to pay the full amount then due and owing upon said indebtedness, and offered and undertook to pay the same to the appellee, but that appellee refused the same, and claimed absolute owner-

ship of the land. The complaint further alleges a refusal by appellee to account for rents and profits, etc., and claims the right to redeem and be allowed as a credit on his indebtedness the rents and profits of the land received by appellee. Appellant further alleges that the said indebtedness "is wholly disproportionate to the value of said land and premises, and was at the time of making the conveyance"—whether the indebtedness was greater or less than the value is not alleged.

The appellee denies specially all the facts tending to show that the transaction related in the complaint constituted a mortgage; alleged that the conveyance was made in consideration of the discharge of the indebtedness due appellee from appellant, and that the debt was so discharged; that the conveyance was so intended to be absolute, and not a mortgage. The issue was submitted to a jury. The jury failed to agree upon a verdict, and were discharged from further consideration of the case.

The court thereafter found for the appellee. Appellant filed his motion for a new trial, which was overruled.

Appellee suggests that this judgment should be affirmed because of the failure of appellant to tender to appellee before suit the amount of the alleged indebtedness, and cites 40 Cal. 120 in support of his view. In that case Hughes loaned to Davis fifteen hundred dollars, and as security therefor took a deed, absolute on its face, for certain real estate, and simultaneously executed to Davis a lease for the premises. On the expiration of the term, the debt not having been paid, and, after notice to quit, Hughes brought suit against Davis to recover the land. It was held by the court that Hughes could recover unless Davis first paid or tendered the amount of the indebtedness. We think, probably, that the case was decided correctly, inasmuch as the mortgagee was in possession with the consent of the mortgagor (the possession of the tenant being that of the landlord, a relation he could not deny), and the mortgagor should not have recovered possession without performing the condition of the mortgage. But this case is easily distinguishable from that. Appellant does not ask possession in this case. If the transaction in this case constituted a mortgage it was such *ab initio*; "once a

mortgage, always a mortgage." We do not think that the appellant in such a case should be required to pay or tender the amount of the indebtedness before seeking the relief he here asks. To do so would or might be to deny him relief at all, for he might not be able to pay. But that fact should not deprive him of his right to have the mortgage foreclosed, and the payment to him of the surplus of the proceeds of a sale of the property above the amount necessary to pay the mortgage debt. The court could do full justice to the parties, if, in fact, the transaction constituted a mortgage, by fixing a new day for the payment of the debt, and in default thereof order a sale of the premises to pay the debt and foreclosure of the mortgagor's equity of redemption.

Upon the trial of the cause before the jury, the appellant offered in evidence a judgment in favor of the Arizona Land Company against Rees, the appellant, and the assignment of the judgment to appellee, in order to show the existence of an indebtedness from Rees, appellant, to Rhodes, the appellee. Upon the objection thereto by appellee, the court rejected the proposed evidence. This ruling is complained of by appellant.

The determination of the question whether the transaction between the parties constituted a deed and an agreement to convey, or simply a security for the payment of an indebtedness from appellant to appellee, depends, as in all contracts, upon the intent of the parties at the time of the transaction. It is not disputed that a deed absolute upon its face may be shown to be a mortgage, if that were the intent of the parties, nor that such intent may be shown by parol evidence or by evidence outside of the written memoranda of the transaction. To ascertain the intent, it is often necessary to know the relation of the parties to each other. Had it been shown, by the execution of the deed in this case and the contemporaneous agreement to reconvey, that the relation of the debtor and creditor existing between appellant and appellee, had ceased by virtue of the execution of the deed, it would justify the inference that the transaction constituted a simple conveyance with an agreement to reconvey, and not a mortgage. On the contrary, if it appeared that notwithstanding the deed the appellant was still indebted to appellee in a sum which was

expressed as the consideration of the deed, that would be a circumstance strongly tending to show that the parties intended simply, by the execution of the deed and the agreement to reconvey, to provide for the security of such indebtedness, and the agreement to reconvey is perfectly consistent in terms with such an intent.

It is alleged by appellant that an indebtedness existed and continued to exist after the execution of the deed. Appellee denies this and alleges that the indebtedness was discharged by the conveyance. The learned court who tried the case finds, among other things, that the debt was discharged by the execution of the deed. There was no evidence of the payment of the debt, except the statement of the appellee, as a witness, wherein he says, "Rees owed me \$4,450 on February 26, 1887, and on that date, in order to pay the same, he made and executed to me a deed." Appellant asserts the continuance of the debt. The best evidence of the indebtedness was the judgment and its assignment to the appellee. That it appeared that it never had been released and discharged of record would have been evidence of its nonpayment, and it is fair to presume that such evidence of payment did not exist from the mere fact of the offer of the judgment. Had the indebtedness been evidenced by a note and the note still remained in the hands of the grantee, it would have been evidence of nonpayment, and no one will contend that evidence of such fact would have been incompetent. We cannot see the difference in principle. We think it was error to exclude that evidence. It would have afforded the best evidence of a material fact. Had it been admitted, the jury might not have disagreed. They were called upon to decide between the statement of the parties, and were deprived of evidence that might have turned the scale. There are other matters discussed in the briefs, but it is unnecessary to consider them, as we think the judgment must be reversed.

For error in excluding from the evidence the judgment offered by appellee, the judgment of the district court must be reversed, and that court is directed to award a new trial.



# MEMORANDUM DECISIONS.

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[Criminal No. 46.]

**TERRITORY OF ARIZONA, Respondent, v. FRANCISCO  
BACA, Appellant.**

**APPEAL** from the District Court of the Third Judicial  
District in and for the County of Apache.

**Sumner Howard, Herndon & Hawkins, and E. M. Sanford,  
for Appellant.**

**T. W. Johnson, and Harris Baldwin, for Respondent.**

**January 13, 1890. Dismissed.**

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[Criminal No. 58.]

**UNITED STATES OF AMERICA, Respondent, v. LITTLE  
BOB, a Wallapai Indian, Appellant.**

**APPEAL** from the District Court of the Third Judicial  
District.

**E. Burgess, and E. M. Sanford, for Appellant.**

**H. R. Jeffords, United States District Attorney, for the  
United States.**

**January 13, 1890. Dismissed.**

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**Ex Parte: In the Matter of E. E. KIRBY, Petitioner.**

**January 13, 1890. Writ granted.**

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[Civil No. 277.]

CLARINDA A. WAKEFIELD, Appellee, v. THE SOUTHERN PACIFIC COMPANY, Appellant.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge.

J. A. Zabriskie, and William Herring, for Appellant.

William M. Lovell, and R. D. Ferguson, for Appellee.

PER CURIAM.—This cause was submitted to the court on the transcript and brief of appellee, and the court having duly considered the same, and being fully advised in the premises, orders that judgment be entered herein affirming the judgment of the lower court, with costs against the appellant and the sureties on the appeal bond, together with ten (10) per cent damages.

January 16, 1890. Affirmed.

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[Civil No. 296.]

JOHN Y. T. SMITH, Appellee, v. C. BURTON FOSTER, Appellant.

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

No appearance of record.

January 16, 1890. Affirmed.

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[Civil No. 314.]

CHARLES YATES, Appellant, v. MARY B. BURTON, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge.

L. F. Eggerd, for Appellee.

June 3, 1890. Affirmed.

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[Civil No. 309.]

**BEN. JAMES et al., Appellants, v. THE NEPTUNE MINING COMPANY, a Corporation, and JOEL SEYMOUR, Trustee, Appellees.**

**APPEAL** from the District Court of the First Judicial District in and for the County of Cochise. **R. E. Sloan, Judge.**

**George G. Berry, for Appellants.**

**W. H. Stilwell, for Appellees.**

**June 16, 1890. Dismissed.**

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[Civil No. 310.]

**CHARLES GRANVILLE JOHNSTON, Appellant, v. THE NEPTUNE MINING COMPANY, a Corporation, and JOEL SEYMOUR, Trustee, Appellees.**

**APPEAL** from the District Court of the First Judicial District in and for the County of Cochise. **R. E. Sloan, Judge.**

**George G. Berry, for Appellant.**

**W. H. Stilwell, for Appellees.**

**June 4, 1890. Dismissed.**

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[Civil No. 298.]

**H. N. ALEXANDER, Appellant, v. CLARK CHURCHILL, Appellee.**

**APPEAL** from the District Court of the Second Judicial District in and for the County of Maricopa. **Joseph H. Kibbey, Judge.**

**H. B. Lighthizer, for Appellant.**

**Edwards & Buck, for Appellee.**

**June 6, 1890. Affirmed.**



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[Civil No. 289.]

**WILLIAM ZECKENDORF**, Trustee for Frank & Co., a Corporation, Appellee, v. **DAVID DUNHAM et al.**, Appellants.

**APPEAL** from the District Court of the First Judicial District in and for the County of Pima. **William H. Barnes**, Judge.

**Maxwell & Satterwhite**, for Appellants.

**Webb & Heney**, for Appellee.

September 3, 1890. Affirmed. (Note by Reporter.—The record shows, "Opinion filed," but none appears in the records of the office of the clerk of the supreme court.)

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**Ex Parte: In the Matter of CHUNG HONG**, Petitioner.

**APPLICATION** for a writ of Habeas Corpus.

**Webster Street**, for Petitioner.

September 5, 1890. Writ denied.

**REPORTS OF CASES**  
**DETERMINED IN**  
**THE SUPREME COURT**  
**OF THE**  
**TERRITORY OF ARIZONA**  
**DURING THE YEAR 1891.**

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[Civil No. 292. Filed January 17, 1891.]

[29 Pac. 13.]

**WILLIAM A. HANCOCK et al., Plaintiffs and Appellants,**  
**v. NEWELL HERRICK et al., Defendants and Ap-**  
**pellees.**

1. **MORTGAGES—FORECLOSURE—EXEMPTION OF HOMESTEAD—DEFENSE—**  
**ISSUE OF FACT—JUDGMENT ON DEMURRER—COMP. LAWS, ARIZ. 1877,**  
**CH. 37, SECS. 1 AND 2, CITED AND CONSTRUED.**—The homestead ex-  
emption provided by statute, *supra*, is a good defense to a fore-  
closure suit to enforce a mortgage, upon a homestead, executed by  
the husband alone. The plea of the statute raises an issue of fact  
to be determined by a trial, and judgment for plaintiff upon de-  
murrer to the answer is error.
2. **SAME—SAME—REPLY BY WAY OF ESTOPPEL—ISSUE OF FACT.**—A reply  
to an answer pleading an exemption, setting up facts constituting  
an estoppel against defendants' plea, unless admitted, raises is-  
sues of fact, which can only be determined by trial.
3. **NEW TRIAL—PURPOSE OF—ISSUES OF FACT DETERMINED AT A FORMER**  
**TRIAL CANNOT BE CONSIDERED.**—The purpose of a new trial is to  
permit a re-examination and determination of issues of fact, and  
the granting of judgment by the trial court upon the pleadings  
because all the facts in issue were before the court upon the  
former trial is error.

**APPEAL** from a judgment of the District Court of the  
Second Judicial District in and for the County of Maricopa.  
William W. Porter, Judge. **Reversed.**

The facts are stated in the opinion.

P. S. Perley, and M. H. Williams, for Appellants.

"If a motion for a new trial is granted the cause is to be tried anew. If a motion in arrest of judgment is granted a repleader will be awarded and the cause proceeded with as before." Texas Pleading and Practice, p. 51.

On September 25, 1887, appellants were granted a "new trial." They have not had a trial since. A judgment was rendered against them on May 6, 1889, but it was without trial and without their fault.

A new trial, *ex vi termini*, is a re-examination of the issues of fact which have once been tried. It is not a re-examination of the issues of law; it is not a repleading.

"The effect of granting a new trial is to remit the cause back to the stage of the original joinder of issues, and it must then be brought on a second time for trial in due course and in regular form." 3 Wait's Practice, 440, 441.

"And in awarding a new trial the court has no power to direct that the evidence given on the previous trial, in whole or in part, shall stand as evidence on the second trial." 13 Abb. 22; 3 Wait's Practice, 441.

"The only mode by which evidence given on the former trial may be made available on the second is by consent or stipulation between the parties." Id. 441.

"The granting of a new trial supersedes the effect of the former trial or wipes out the verdict. The case goes back upon all the issues of fact." Hilliard on New Trials, p. 74; *Hidden v. Jordan*, 28 Cal. 301.

"A new trial is a rehearing of the legal rights of the parties upon disputed facts." Bouvier's Law Dictionary, 1880 ed.

"It is either upon the same or different or additional evidence." Id.

"A new trial is a re-examination of the issues of fact which have once been tried by a court in the same court in which the first trial was had." Green's Practice and Pleading, sec. 1091.

"A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees."

"The first element is that a new trial is a re-examination of

an issue of fact. It is not a re-examination of an issue of law. Upon the same principle, viz.: that a new trial is a re-examination of an issue of fact, it has been held that errors in rulings upon demurrers to pleadings cannot be reviewed on motion for new trial. This is manifestly correct." Hayne on New Trial, sec. 1.

Thompson on New Trials (vol. 2, sec. 2708) says: "A new trial is a retrial or re-examination in the same court of an issue of fact, or some part or portion thereof, after verdict by a jury, report of a referee, or a decision by the court. It is a retrial of the facts of the case or a re-examination of an issue of fact or rehearing of the legal rights of the parties upon disputed facts before a court or jury which has been tried at least once before the same court."

H. N. Alexander, and H. B. Lighthizer, for Appellees.

SLOAN, J.—This action was commenced December 21, 1885, and was brought to foreclose two mortgages,—one given to secure a note for \$1,008.60, bearing date November 1, 1883, signed by the said William A. Hancock, and made payable to the order of Gus Ellis & Co.; the other, to secure a note for \$1,602.90, bearing date December 17, 1883, signed by the said William A. Hancock and Lillie B. Hancock, his wife, and made payable to Herrick & Co., appellees herein. The mortgage given to secure the first of said notes was executed by said William A. Hancock, covering lots 14, 15, 16, 17, and 18, in block 77, in the city of Phoenix, and was assigned February 28, 1885, to the appellees herein, Herrick & Co. The mortgage given to secure the second of said notes was executed by the said William A. Hancock and his wife, and covered the property described as aforesaid. Each of said notes sued upon was made a separate cause of action in the complaint, which was in the usual form, and verified. In their answer the appellants admitted the execution of the note bearing date November 1, 1883, but, by way of special defense, set up that, at the time of the execution of the note and mortgage, they were husband and wife, and that the property described in the latter was and had been occupied by them as a homestead, and did not exceed in value the sum of

five thousand dollars; that said mortgage was executed by the said William A. Hancock alone; and that said Lillie B. Hancock, his wife, did not join therein. These facts were also pleaded by them by way of cross-complaint, in which affirmative relief was asked in the way of an injunction to restrain appellees from enforcing any claim against said property under said mortgage, and that the same be declared and adjudged as a homestead exemption. No defense to the second cause of action, based on the mortgage, bearing date December 17, 1883, was made. A trial having been had, and a judgment entered upon the issue as thus presented by the pleadings, and a new trial having been granted at a former term of the court, the appellees thereafter, upon the sixteenth day of October, 1888, filed a demurrer to the answer of appellants, upon the ground that the facts stated did not constitute a defense to said action; and by way of estoppel pleaded that, in the second mortgage sought to be foreclosed, appellants designated lot 14 as their then residence, and no other; and, further, that said first-described mortgage was executed by the said William A. Hancock with the full knowledge, consent, connivance, and procurement of said Lillie B. Hancock, his wife. To this reply appellants demurred, and moved to strike out the same as a departure in pleading, for the reason that it was an attempt to amend the complaint. Upon the twenty-sixth day of November, 1888, the cause came on for trial, and the demurrer of the appellants to the answer was then argued and submitted, and by the court taken under advisement. The demurrer to appellees' reply was likewise, upon the same day, submitted and taken under advisement by the court. No other proceedings were had in the cause until the sixth day of May, 1889, when the court ordered judgment to be entered in favor of appellees, that "an order of sale go, except as to lot 14, upon which home stands." Judgment was thereupon entered in accordance with this order of the court.

In thus entering judgment without a trial upon the merits, the court doubtless intended to render judgment upon the pleadings. We have no doubt that, under our practice, the court may, upon motion, enter a judgment when it appears that the complaint states a cause of action, and the answer

fails to state matter sufficient to bar or defeat it. In this instance the question to be determined is whether the answer of appellants to appellees' complaint constituted a defense to the first cause of action. This is to be determined by the construction to be given the homestead exemption law as it existed at the time the suit was brought. This law is to be found in sections 1, 2, ch. 37, Compiled Laws 1877, which read as follows: "Section 1. The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, and the water-rights and privileges pertaining thereto, sufficient to irrigate the land, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale or execution, or any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this act, or if contracted or incurred at any time in any other place than in this territory. Sec. 2. Such exemption shall not extend to any mechanic's, laborer's, or vendor's lien, or to any mortgage lawfully obtained; but no mortgage, sale, or alienation of any kind whatever of such land by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband: provided, that such signature and acknowledgment shall not be necessary to the validity of any mortgage upon the land executed before it became the homestead of the debtor, or executed to secure the payment of the purchase money." There can be no doubt but that the exemption provided for in said sections could properly have been claimed at the time suit was brought, and if urged, would constitute a good defense in proceedings to enforce, by foreclosure and sale, a mortgage upon such homestead, executed by the husband alone, without the signature of the wife. Such a plea raises an issue of fact, to be determined as other issues of fact. If there be facts which would operate as an estoppel upon the appellants from claiming as exempt such homestead, they could only be determined, unless expressly admitted, by a trial upon its merits. Appellees contend that, inasmuch as a former trial had been had upon the issue as originally made by the pleadings, the facts were all before the court when it ordered

judgment upon the pleadings. This position is untenable, for the reason that the very purpose and object of a "new trial" is a re-examination and determination of the issue of fact, and this purpose and object might be defeated if no opportunity be given for the production of additional and other evidence than that adduced upon a former trial. We hold that the court erred in rendering its judgment of November 26, 1888, and we accordingly reverse the judgment, and remand the case for trial.

Gooding, C. J., concurs.

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[Civil No. 286. Filed January 17, 1891.]

[73 Pac. 400.]

F. M. HARGRAVE, Plaintiff and Appellant, v. LON D. HALL et al., Defendants and Appellees.

1. IRRIGATION—CONTRACTS—COMPANY REGULATIONS—JUDGMENT—PRORATING WATER.—Where an irrigation company has contracted to furnish a water-user for all time water sufficient to irrigate one hundred and sixty acres of land, and such water-user is the first to purchase and the first to beneficially use the water upon the land, it is error for the court to decree that he shall be subject to the same rules and shall prorate his water with parties who purchased at subsequent times.
2. SAME—TRESPASS—INJUNCTION—DAMAGES.—Where an irrigation company, without justification, has destroyed a water-user's head-gates and damaged his crops he is entitled to an injunction, damages and costs.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. William W. Porter, Judge. Reversed.

The facts are stated in the opinion.

Edwards & Buck, for Appellant.

Goodrich & Street, for Appellees.

KIBBEY, J.—The pleadings and statement of facts show that Lon D. Hall owned the whole water location and all the ditches in controversy. That he contracted to sell to Hargrave one share of stock in the Enterprise Canal, and “to furnish said party of the second part (Hargrave) for all time water sufficient to irrigate one hundred and sixty acres of land.” This contract was entered into the third day of August, 1886. Then the canal was not constructed. Eight hundred dollars was the consideration to be paid. March 10, 1887, the following receipt was given: “Received of P. M. Hargrave the sum of (50) fifty dollars, being the amount in full for one share and water right in the Enterprise Canal as per agreement dated August the third, 1886. [Signed] Lon D. Hall, per John R. Hall.” This receipt entitled the appellant to all his rights under the contract. After this—June 29, 1888,—appellee Hall writes Hargrave as follows: “After the tenth of July, 1888, I will expect you to irrigate your place [describing it] from one ditch and using one head gate only.” The facts show that Hargrave had been using two head gates and two lateral ditches; that it was great economy for him to do so; that to require him to do as notified would occasion great additional expense to him. The surveyor reported to the court that it would be “almost impossible to irrigate from one head gate.” The appellees pulled out and destroyed the head gates of the lateral ditches, and plowed up the ground, and scraped the dirt in the ditches, and, according to appellant’s evidence, not contradicted, injured appellant in his trees and crops about five hundred dollars. The appellant used at the time of this summary proceeding only about forty inches of water. The court decreed him eighty inches of water. Appellees were, then, as shown by the decree, clearly in the wrong. Appellant was the first to use water out of the ditch and to plant trees and a crop. According to Hall’s evidence, at the time Hargrave bought his share and water right there were only two other shares sold, but before suit was brought Hall had sold shares to eight or ten others. It appears that Hall and the others wanted Hargrave to give up his contract and make a new one agreeing to be placed on an equality in all things with the others, and later share in the labor and ex-



pense of repairing and keeping up said canal, but giving to Hall certain advantages in the canal not accorded to others, or rather certain properties personal to himself. One of the terms of the agreement which Hall wanted Hargrave to make in lieu of the contract he did make reads as follows: "Any water or mill power developed in the extension and enlargement of said canal shall be the sole property of the party of the first part." There is no equity in this if Hargrave preferred to stand by the contract he had made. The appellee was displeased, and tore up and destroyed the two head gates and the two ditches, and thereby injured and damaged him about five hundred dollars. What had Hargrave done to provoke or justify this wanton trespass? He had claimed that he was entitled to stand by his contract, and that it gave him a right to sufficient water to irrigate one hundred and sixty acres, though he was only using one half the inches the court held he was entitled to. The court decreed that he was entitled to eighty inches of water and two head gates, but to use only one at a time, and that "plaintiff shall use and have the enjoyment of such water upon precisely the same terms as other patrons of said Enterprise Canal, and shall be subject to the same rules of distribution and pro rata shares and shall pay his proportion of costs, charges, and expenses in maintaining said canal." Though first to purchase and first to use he is, by the decree, "subject to the same rules of distribution" as those who purchase shares of Hall at subsequent times. In times of scarcity of water did not Hargrave have a right to water "sufficient to irrigate one hundred and sixty acres of land"? "And the said first party further agrees to furnish said party of the second part, for all time, water sufficient to irrigate one hundred and sixty acres of land," is the language of the written agreement. By the decree, as we understand it, another condition is added,—viz., provided further that parties who shall hereafter buy shares of Hall may require Hargrave to prorate his sufficiency with them. But it is apparent by the decree of the court that he was entitled to eighty inches of water and two head gates. We think it is apparent from the evidence that appellant had done nothing to justify or mitigate the arbitrary action of the appellees in destroying his head

gates and ditches and threatening to continue so to do, and that appellant was, therefore, entitled to an injunction. We think the decree should also have given him damages and costs.

Judgment is therefore reversed and a new trial granted.

All concur.

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[Civil No. 301. Filed January 24, 1891.]

[26 Pac. 376.]

GRANVILLE H. OURY, and THE COUNTY OF MARICOPA, Defendants and Appellants, v. JAMES C. GOODWIN, Agent of the Territory of Arizona, Plaintiff and Appellee.

1. **EMINENT DOMAIN—POWER OF TERRITORY TO PROVIDE FOR EXERCISE OF**—REV. STATS. ARIZ. 1887, TITLE 22, "EMINENT DOMAIN," CITED—WITHIN LEGISLATIVE POWERS DELEGATED BY REV. STATS. U. S., 1878, SEC. 1851—IDEM, ORGANIC LAW OF ARIZONA, REV. STATS. ARIZ. 1901, PAR. 15, CITED.—Congress, having power to pass an act providing for the exercise of the power of eminent domain in the territory, has delegated this power, by section 1851, *supra*, to the territorial legislature.
2. **SAME—PUBLIC USE—HOW DETERMINED.**—There is no definition of a public use yet formulated to which one can go as a certain criterion. To know what is a public use which authorizes the power of eminent domain recourse must be had to cases rather than to definitions.
3. **SAME—SAME—USES APPARENTLY PRIVATE—GENERAL WELFARE—PUBLIC POLICY.**—In many instances where various states have clothed private corporations and individuals with the power of eminent domain there is no participation by the general public, and the public use consists in the purely incidental benefits. Peculiar conditions, and the great benefit that would result to the general public seemed to justify a public policy authorizing the taking of private property to promote the general welfare.
4. **SAME—PRIVATE OWNERSHIP MUST YIELD TO PUBLIC NECESSITY—"PUBLIC NECESSITY" DEFINED.**—All condemnation acts are predicated on the proposition that private ownership must yield to public necessity. "Public necessity" often means public convenience and advantage.
5. **SAME—GENERAL LAWS—TO DEVELOP RESOURCES.**—A territory may legislate by laws general in their operation, exercising the power

of eminent domain, that its advantages and resources may receive the fullest development for the general welfare.

6. IRRIGATION—PUBLIC POLICY—WATERS PUBLIC—PRIVATE OWNERSHIP—PRIVATE CONTROL—REV. STATS. ARIZ. 1887, PARS. 2863, 3198, 3201, 3202, CITED.—It is the policy of this territory to make the use of water within the reach of all, and to guard it against monopoly by private ownership on the one hand, and against being hemmed in by the ownership of the adjacent land on the other.
7. SAME—EMINENT DOMAIN—RIGHT OF WAY FOR DITCHES—CONSTITUTIONALITY—REV. STATS. ARIZ., TITLE 22, "EMINENT DOMAIN," CITED AND HELD CONSTITUTIONAL.—Title 22, "Eminent Domain," providing for the acquirement of a right of way for ditches to supply farming neighborhoods with water, is in accord with the public policy of the territory and is not in contravention of the constitution of the United States, the organic act of the territory, or any act of Congress.
8. STATUTES—CONSTRUCTION—EMINENT DOMAIN—LEGISLATURE—TO DETERMINE WHAT IS PUBLIC USE—DUTY OF COURT TO ENFORCE UNLESS CLEARLY UNCONSTITUTIONAL—EFFECT, LEGISLATIVE QUESTION.—It is in the first instance for the legislature to declare what are public uses to which private property may be appropriated. If such statute is constitutional, it is the duty of the court to enforce it. If there are doubts as to its constitutionality, if not clearly unconstitutional, being the act of a co-ordinate branch of the government, the courts should treat it as valid. If the law is unwise or oppressive, the power that created it must be looked to for its repeal.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

A. Buck, for Appellants.

It is now well settled that while, if the use is public, the legislative discretion is absolute as to the expediency or necessity of exercising the power, the legislature cannot finally determine whether the use is public; that question is a judicial one to be answered by the courts. *Taylor v. Beecher*, 44 Vt. 548; *Laughbridge v. Harris*, 42 Ga. 500; *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 57, 61; *Palort v. Hudson*, 16 Gray, 417, 421; *Bankhead v. Brown*, 25 Iowa, 540; *Custer v. Tide Water Co.*, 18 N. J. Eq. 54-63; *Harris v. Thompson*, 9

Barb. 350-362; *Matter of Townsend*, 39 N. Y. 171, 174, 181; *Hayward v. Mayor*, 7 N. Y. 314.

If the use be a public one, the decision of the legislature as to the necessity or propriety of the taking, and as to the manner and the instruments of the taking, whether by the state itself or by individuals or corporations, is final. *Ford v. Chicago R. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791; *People v. Smith*, 21 N. Y. 597; *Hays v. Risher*, 32 Pa. St. 189; *Railroad Co. v. Lackland*, 25 Mo. 515; *Railroad Co. v. Gott*, 25 Mo. 540.

Land cannot be condemned for private ways, and statutes authorizing such taking for ways which are private are invalid, although the ways be designated neighborhood roads. *Dickey v. Tennison*, 27 Mo. 373; *Nescitt v. Trambo*, 39 Ill. 110, 89 Am. Dec. 290; *Greear v. Crosby*, 40 Ill. 175; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161.

The distinction between a public and a private use is clearly defined in *Hülmer v. Lime Point*, 18 Cal. 251, 252; *Memphis Freight Co. v. Memphis*, 4 Cold. 425.

There must be some true criterion in order to ascertain whether property is about to be taken for public or private use. What this criterion is must depend upon the nature and character of the use.

What is a public use? It is defined to be a use in which the public have a right to participate. A public road or bridge, or a street in a town or a city, and the like. They may be located where but few people make use of them, but they are of such a character that anybody who chooses may make use of them. A public use, then, is one in which anybody who chooses has a right to participate.

On the contrary, a private use is where the owners thereof have such right of property and control of the use as enables them to allow any one whom they may choose to participate in its benefit to the exclusion of all others; in other words, a use where the owners have the right to dispose of the benefits and privileges at whatever price they see fit, and to whom they see fit, to the exclusion of others, and over such the legislature has no control.

The evidence in this case is, that a certain number of men own a certain amount of land, that each of these own stock in the ditch in proportion to their land; that the water to be

carried through the ditch, passing through the land which they wish condemned, is all owned by them, and they are to be the exclusive owners of the ditch. The general public, under the testimony in this case, is to have no rights in the ditch, nor in the water passing through it. It is to be a private concern, in which no outsider is to participate. How can the enterprise be anything more or less than a private enterprise, in the fullest sense of the term? In this case the owners of the rights in the ditch are owners of a private right, as much so as the right which they have in the lands which the testimony shows they own. If the land can be condemned in this case, then land may be condemned on the request of a single individual for the purpose of irrigating the smallest subdivision of land, a matter in which the public would not and could not have any right.

We do not contend that irrigation ditches cannot be constructed in accordance with a plan which would constitute the same a public use. A canal constructed for the purpose of distributing water to the public might be such as would be a public use, but the evidence in this case falls far short of showing the existence, or the proposed existence, of any such concern.

Private property cannot be taken for private use. *Lambert v. Hoke*, 14 John. 383; *Herrick v. Stover*, 3 Wend. 380; 2 Kent's Commentaries, 340; *Wilkinson v. Leland*, 2 Pet. 857; Story on the Constitution, 861; *In re Albany St.*, 11 Wend. 149, 25 Am. Dec. 618 and note; *Bloodgood v. Mohawk etc. R. R. Co.*, 18 Wend. 59, 31 Am. Dec. 313, and note; *In re John and Cherry St.*, 19 Wend. 659; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274, and note.

W. J. Kingsbury, for Appellee.

The right of eminent domain may be exercised in behalf of the following public uses: . . . canals, ditches, . . . and for supplying farming neighborhoods with water, . . . and reclaiming lands. Rev. Stats. Ariz., par. 1762, subd. 4, (Same in Cal. Code Civ. Proc., sec. 1238); Cooley on Constitutional Limitations, 532.

Any person may without further legislative action acquire private property for canals and ditches for supplying farm-

ing neighborhoods with water and reclaiming lands. Rev. Stats. Ariz. 1766, 1762. (Same in Cal. Code, par. 1001.)

"Farming neighborhoods." *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 700.

In general the legislature is the sole judge of what constitutes a public use. But to a very limited extent the constitutionality of a statute purporting to confer the right to take private property for public use is a judicial question. Courts will only interfere when there is no semblance of public benefit, or when the absence of all pretense of public interest is clear. *Gas Co. v. Richardson*, 63 Barb. 437.

If the public interest can in any way be promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain. 2 Kent's Commentaries, 340; *Gilmer v. Lime Point*, 18 Cal. 229.

The necessity for appropriating private property for the use of the public is not a judicial question. The power resides in the legislature. *People v. Smith*, 21 N. Y. 595; *Tidewater Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 696.

Supplying water to "farming neighborhoods" for irrigation, in view of the arid soil, etc., is what the legislature has decided it to be—a public use. *Dicta* in *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 699.

The right to acquire private property for irrigating-ditch purposes exists in favor of those holding lands so situated as to make it necessary to cross the lands of others independent of any statutory provision. The servitude arises not by grant but by operation of law. Hallett, C. J., in *Yunker v. Nichols*, 1 Colo. 551.

GOODING, C. J.—This is an action under title 22 "Eminent Domain," of the Revised Statutes of Arizona, act approved March 9, 1887, to condemn real estate of appellant for the purpose of a canal or ditch for irrigating purposes. The appellant contends—1. That the legislature had no power to pass the act; 2. That the court, and not the legislature, must be the final judge of what is a public use, as distinguished

from a private use; and 3. That the use in this case is private, and not public.

These are questions of the utmost importance in this territory, and have been presented and argued with ability commensurate with their importance. Was the act, "Eminent Domain," beyond the power and authority of the legislature, and therefore void? The organic law of Arizona provides (U. S. Rev. Stats. 1878, sec. 1851): "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no laws shall be passed interfering with the primary disposal of the soil. . . ." The exercise of the power of eminent domain is certainly "a rightful subject of legislation." The various and imperative demands for the exercise of this power are so obvious as to preclude the idea that Congress did not intend to confer it by the language used in the organic act. Public buildings, public roads, railroads, canals, water-works, sewers, gas, electric lights, and all the modern improvements of a public character are dependent on the exercise of this power. Not only is the exercise of the power of eminent domain a "rightful subject of legislation," but this power is implied from the negative. "But no law shall be passed interfering with the primary disposal of the soil." The primary disposal, it is needless to say, is the disposal of it by the government when it parts with its title. The legislature has the power to determine and fix by what tenures lands in the territory shall be held, and under what forms titles shall pass, and who shall be the heirs at the death of the proprietor and pass other like laws. The purpose of the Organic Act was to transfer from Congress to the territorial legislature the power that Congress had to pass laws for the people of the territory upon "all rightful subjects of legislation." The territorial legislature is substituted for Congress, and clothed with the power of Congress, except that it may not pass laws interfering with the primary disposal of the soil, nor tax the property of the United States, nor tax the lands or other property of non-residents higher than the lands or property of residents. That Congress had the power to pass an act providing for the exercise of the power of eminent domain in the territory no one will question. That it

has delegated this power to the territorial legislature we think is quite clear. Cooley on Constitutional Limitations, 650, says: "In the new territories, however, where the government of the United States exercises sovereign authority, it possesses, as incident thereto, the right of eminent domain, which it may exercise directly or through the territorial governments."

Was the property taken for a private or public use? The court below found that the property in question was sought to be condemned for a "use authorized by law," and was necessary for said use. The "statement of facts" is the evidence taken on the trial. It appears that the ditch in question is connected with the Tempe Canal, and what is known as the "Southern Branch." Mr. Goodwin says: "Our branch is not an organization of its own. It is a part of the southern branch, in which Mr. Oury owns stock; it is a part of the same canal." He further states that: "The *zanjero* of the southern branch has charge of our canal; our canal is just a part of the southern branch." "The directors of the southern branch have control of our ditch as well as the southern branch; the whole business is under one set of directors." He further states that there are about eight thousand acres of land under the ditch, desert land, worthless without irrigation. He further mentions the names of thirteen persons who own stock, and states that none of these shareholders own more shares than is necessary to irrigate their land, and that it was the intention to give each shareholder sufficient to irrigate his own land. That others besides these shareholders owned land within the boundaries marked and as covered by the canal. The ditch is owned by a joint-stock association, not a corporation. That about one thousand inches of water was used through the canal, and the shareholders owned about two thousand acres. The one thousand inches of water run through the ditch was owned by the shareholders in the Tempe canal, and in the southern branch both. That one hundred inches would be used to one hundred and sixty acres, sometimes more. These facts, not contradicted, bear on the question of the use being a public use, or a purely private use. The other facts we deem it unnecessary to set forth, as the controversy arises on the facts above set out. The amended complaint alleges, among other



things, that the "plaintiff is a resident of the territory of Arizona, county of Maricopa, and an agent of the said territory for the purpose hereafter mentioned, by virtue of title 22 of the Revised Statutes of said territory, and as such agent brings this suit against the defendants for the purposes mentioned aforesaid"; and in paragraph 4, in substance, "that plaintiff, J. C. Goodwin, Robert G. Goodwin, James McClintock, Robert J. Martin, James Gilliland, T. G. Cartledge, Fisher G. Bailey, Douglas Lemon, Adams, and numerous other persons, farmers residing in the Missouri Flat neighborhood, county and territory aforesaid, are the owners of about eight thousand acres of arable and irrigable lands in said neighborhood, wholly valueless without irrigation," etc.; and prays "to condemn the land for the purposes mentioned in the complaint." The damages, as found by the court, amounted to \$124.50.

Do the facts of the case disclose that the use was a "use authorized by law,"—in other words, a public use, in the view of the law? There is no definition of a public use that has yet been formulated to which we can go as a certain criterion. To know what is a public use which authorizes the exercise of the power of eminent domain, we must have recourse to cases rather than definitions,—to uses that have been held to be public. There are certain uses about which there is no controversy. Property taken for state-houses, for court-houses, for school-houses, for public roads, and the like, which pass under the immediate control of the public authorities, are cases of clear and direct public uses. Property taken for railroads, canals, and the like have also been conceded to be taken for public uses. In this class of cases the property is not in the possession of or controlled by the officers or agents of the public. Private individuals own and control the property. The title to the property is not in the public, nor is the possession or control, as in the case of court-houses, school-houses, etc. The public use consists in the right of the people to transit and transportation at reasonable rates. The public receives a benefit and advantage in this: that a new and better means of travel and transportation is afforded. In other words, in this class of cases it is conceded that the property of the individual owner is properly and lawfully

taken, because the general public receives a convenience and advantage, and a right to participate in the use. But there is another class of cases on an entirely different basis. In a number of the states where the physical conditions of the country offer inducements for the construction and erection of mills for grinding grain or sawing lumber, laws have been passed authorizing individuals and private companies to condemn mill-sites. These laws have been sustained in the states where they have been enacted, though questioned, criticised, and often the authority denied, outside of the jurisdictions where the benefits are enjoyed. Upon what principle or reasoning can these laws be sustained? The public do not participate in the title to the property condemned; nor in the possession or control; nor in the use direct, as in the case of railroads, canals, etc. The courts which have upheld these laws as constitutional rank among the first in the country. We refer to the following cases on this point, and other points in this case: *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 705; *Holyoke Co. v. Lyman*, 15 Wall. 507; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *In re Application for Drainage of Lands*, 35 N. J. Law, 497; *Hartwell v. Armstrong*, 19 Barb. 166; *Shaw v. Railroad Co.*, 16 Gray, 415; *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Talbot v. Hudson*, 16 Gray, 417; *Mill Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Jordan v. Woodward*, 40 Me. 317; *Manufacturing Co. v. Fernald*, 47 N. H. 444; *Ash v. Cummings*, 50 N. H. 591; *Hazen v. Essex Co.*, 12 Cush. 477; *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Dec. 546; *Hankins v. Lawrence*, 8 Blackf. 266; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Venard v. Cross*, 8 Kan. 248; *Thien v. Voegtlander*, 3 Wis. 461; *Higginson v. Inhabitants of Nahant*, 11 Allen, 530; *Commissioners v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *County Court of St. Louis Co. v. Griswold*, 58 Mo. 175.

In *Holyoke Co. v. Lyman*, 15 Wall. 507, Clifford, J., says: "Authority to erect dams across such streams for mill purposes results from the ownership of the bed and the banks of the stream; or the right to construct the same may be acquired by legislative grant, in cases where the legislature is of the

opinion that the benefits to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain; and, to authorize such an interference with private rights for that purpose, lands belonging to individuals have often been condemned for such purpose, in the exercise of the right of eminent domain, in cases where, from the nature of the country, mill-sites sufficient in number could not otherwise be obtained; and that right is even more frequently exercised to enable mill-site owners to flow the water back beyond their own limits in order to create sufficient power or head and fall to operate their mills." *Mill Corp. v. Newman*, 23 Am. Dec. 627, says: "But it is said the analogy fails when applied to laying bare the flats in order to get the water-power for mills, because the public have no right in respect to the manufactories, as they have to travel on the turnpike roads. But the public may be well said to be paid or compensated in the one as well as in the other case, and are benefited by the one improvement as well as by the other. Take the grist-mill established in this city as an example. Is it no benefit to have the corn ground near to the inhabitants, rather than at a distance? But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll. . . . For more than a century the mill-owners had the right to raise a head or pond of water by flowing the lands of others, paying the damage. In many such cases valuable meadows have been inundated, and thus private property has been taken without the consent of the owners, excepting only as they may be supposed to have consented to the laws made by the legislature. But for these 'Mill Acts,' as they are called, the mill-owner might have been liable for the damages as at common law, or the owner of the land might have removed the dam as a private nuisance. But under and by virtue of these acts the dam is protected. The owner of the land is thereby deprived of the entire dominion of his soil, because the public good required the sacrifice of his lands for a reasonable price. Now, we have nothing to do with the expediency of these various mill acts, but it is entirely apparent that the legislature have considered it for the public good to encourage the erection of mills, and have

subjected the property of citizens to the control of mill-owners, they paying the damage. The principle is that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and giving it to another. At most, it is a forced sale to satisfy the pressing want of the public. Now, this is as it should be. The will or caprice of an individual would often defeat the most useful and extensive enterprises if it were otherwise." It is not claimed in the case just cited that the right of the general public to participate is the basis of the right to condemn. The resulting benefits are held sufficient, and are relied upon as justifying the exercise of this power.

In *Scudder v. Falls Co.*, to be found in 23 Am. Dec. 770, the court discusses what is a public use, and on what the power of eminent domain is based. The case is stated in these words: "Whereas, the object of the present franchise is to create a water-power and erect thereon extensive manufacturing establishments. These will be under the control of individuals. The company will either build or lease. They may build for themselves or lease to whom they please, and they are under no obligation to let the public participate in the immediate profits of their undertaking. If to establish this as a public benefit, it is indispensably necessary that the public should have the privilege of participating in it directly and immediately, then the proposition is not made out, and the defendants have no authority. But is not this view too narrow? Can public improvements be limited within such a compass? May we not, in considering what shall be deemed a public use and benefit, look at the objects, the purposes, and the results of the undertaking?" In this case, decided as early as 1832, it was held that the use was public, and not private, because of the incidental benefits to the public. There was to be no participation by the public, only the incidental benefits. The court further says: "Nor is it [eminent domain] limited to private corporations whose sole object, or even whose primary object it is to promote the public good. Such corporations are not to be found. Private interest or emolument is the *primum mobile* in all. The public interest is secondary and consequential." And again: "The

ever-varying condition of society is constantly presenting new objects of public importance and utility, and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being." 22 Am. Dec. 700. After referring to a number of cases wherein it has been held that "Mill Acts" are constitutional if the public have the right to participate, the court goes on to say: "But in many of the states the validity of statutes authorizing the condemnation of sites and the flowage of land, for the establishment and maintenance of mills and other manufactories, has been upheld on the broad ground, that, without regard to any actual right of the public in the use of them, they are of such public utility as to be in the nature of public improvements." *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Todd v. Austin*, 34 Conn. 78; *Occum Co. v. Manufacturing Co.*, 35 Conn. 496; *Grammell v. Potter*, 6 Iowa, 548; *Venard v. Cross*, 8 Kan. 248; *Harding v. Funk*, 8 Kan. 315; *Cogswell v. Essex Mill Corp.*, 6 Pick. 94; *Fiske v. Farmingham Co.*, 12 Pick. 68; *Mill Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Hazen v. Essex Co.*, 12 Cush. 475; *Miller v. Troost*, 14 Minn. 365, (Gil. 282); *Manufacturing Co. v. Fernald*, 47 N. H. 444; *Newcomb v. Smith*, 1 Chand. (Wis.) 71; *Fisher v. Horicon*, 10 Wis. 351; *Holyoke Co. v. Lyman*, 15 Wall. 507, per Clifford, J.

In 47 N. H. 456, this question is put: "Or, to put the question in a general form, is it of such general public advantage that the streams and waters of this state should be brought into practical use for manufacturing purposes that a private right standing in the way of the enterprise, designed to accomplish extended and connected improvements in the water of a large stream, . . . is taken for a public use when taken to advance such an enterprise and remove an obstacle to its success? The act authorizing the property taken was sustained by the court. In the case of *Tide-Water Co. v. Coster*, 18 N. J. Eq. 521, 90 Am. Dec. 634, it is held that the right of eminent domain could be employed for the purpose of reclaiming large tracts of tide-water land, and based its decision on the ground that 'it is the resulting general utility which gives such an enterprise a kind of public aspect, and invests it with privileges which do not belong to mere

private interests.' The case of *Head v. Manufacturing Co.*, decided by the supreme court of the United States at the October term, 1884, (113 U. S. 16, 5 Sup. Ct. Rep. 441,) is instructive on the subject of the 'Mill Acts' of many states, and does not deny their constitutionality, even in the instances where there is no pretense of a right on the part of the public to participate, except in the resulting benefits. The general mill act of New Hampshire authorized 'any person or any corporation' to erect a dam flowing the lands of others, paying the owners of land flowed damages to be assessed 'by a committee or a jury.' In that case, as in this, it was claimed that it was taking private property for private use, contrary to the constitution. The taking was held to be lawful, on the right of the legislature to make laws affecting such cases. When property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

But we desire to quote from this decision of the highest court in the land, and of so recent delivery, for the purpose of showing the strength of the authorities on the propositions involved in this case. First, the act which is sustained gives the right to "any person or any corporation" to flow the lands of others; that is, as held in many cases, to take them. Further it says: "General mill acts exist in a great majority of the states of the Union. Such acts authorizing land to be taken or flowed *in invitum* for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware, and North Carolina, as well as in Massachusetts, New Hampshire, and Rhode Island, before the Declaration of Independence, and exists to this day in each of these states except Maryland. . . . They were enacted in Maine, Kentucky, Missouri, and Arkansas soon after their admission into the Union. They were passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama, and Florida while they were yet territories, and re-enacted after they became states. They were also enacted in Pennsylvania in 1803, in

Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia, and Georgia, but were afterwards repealed in Georgia. In most of these states their validity has been assumed without dispute; and they were never adjudged to be invalid anywhere until since 1870, and then in three states only, and for the incompatibility with their respective constitutions. "The principal objects, no doubt, of the earlier acts were grist-mills; and it has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist-mill which grinds for all comers, at tolls fixed by law, is for a public use. But the statutes of many states are not so limited either in terms or in the usage under them. In Massachusetts for more than half a century the mill acts have been extended to mills for any manufacturing purpose. And throughout New England, Pennsylvania, Virginia, North Carolina, Kentucky, and many of the western states, the statutes are equally comprehensive." I have quoted thus fully because the expression is that of the supreme court of the United States, and as recent as 1884; and because it shows that these acts are not sustained as constitutional because of the right having been exercised before the adoption of the constitutions, though many cases place the right or power on that ground; and, further, because in my opinion, the mill acts of the numerous states have far less foundation in public necessity or public utility than the water acts of Arizona, and because the similarity of the acts is apparent. Under the mill acts any person or corporation may take private property for their use, the benefits being the general and resulting benefits to the public. Under the water acts any person or corporation may take right of way for water. The mill acts are held valid where there is no participation by the public. Is it then necessary that there should be participation direct under the water acts, to obviate the objection of its otherwise being a private, and not a public use? In some of the drainage acts of the various states and territories there is no participation. I am not unmindful of the fact that some cases place the lawfulness of both the mill acts and the drainage acts under the power of the legislature, expressed by the court in the case from which we have just

quoted, viz., the right to compel owners of private and separate property to join with other owners of private and separate adjoining property to improve the same *in invitum*, as by a common ditch, party-walls, etc. In the case of the exercise of the power of eminent domain, the individual has a portion of his property taken for which ample compensation is made. In the case of a resort to the other power, as in the drainage acts or some of them, the part not taken may be sold at a sacrifice to pay assessment for the benefits. But there are many cases where the power must rest on the right of eminent domain, as where one man's land is flowed for the benefit of another man's mill; where a right of way is taken over one man's land for a ditch to drain the swamp lands of one or more of his neighbors. In all these cases the private property of the individual is taken, and it is of little concern to him under what particular power. If under the power of condemnation, he gets compensation for what is taken. If under the power to assess for improvement, a forced sale of all may result in a sacrifice of all. If the constitution cannot protect in the latter case, ought it to be invoked in the former to the detriment of the community, and against a general beneficial public policy, growing out of peculiar and extraordinary physical conditions of the country? The counterpart in principle to the proposition involved in this case is to be found in the drainage laws of various states, especially on the sea-coast. There it is to get water off the soil; here it is to get it on to and in the soil. What difference can there be in principle? Some of the cases base the lawfulness of the drainage acts on the plea (may we not say in many cases, pretext) of promoting the public health. Many other cases base the right on the broad ground of public benefit and utility. 22 Am. Dec. 705. Rodman, J., said, in sustaining the act to condemn: "If 'public utility' is synonymous with 'public use,' the case is still clearer. In many cases, therefore, it has been held that acts for the drainage of lands by the power of eminent domain, where the chief object was to improve the land and render it fit for human habitation and cultivation, were constitutional and valid." *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *In re Application for Drainage*, 35 N. J. Law, 497; *Hartwell v. Armstrong*,



19 Barb. 166; *Talbot v. Hudson*, 16 Gray, 417; *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787. In the last case Rodman, J., said: "It is well known that in the Atlantic section of this state there are hundreds of thousands of acres of what is called 'swamp land,' which from the flatness of their surface, and the filling up of the natural courses of drainage, if any ever existed, cannot be relieved of the water which ordinarily covers them, and made fit for human habitation and cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by the permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and unpopulated wilderness, and it will be entirely valueless to those who bought it from the state on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living, and so many more in the future, must be deemed one of general and public utility. . . . Roads and aqueducts are classed together in the Institutes as servitudes of the same public character. In the swamps, which the act in question chiefly affects, the canals are more important than the roads, as they must always precede them."

In these cases water must be taken off the lands to fit them for habitation and cultivation. In Arizona water must be taken on the lands to fit them for habitation and cultivation. *Lux v. Haggin*, 69 Cal. 304, 10 Pac. 674, says: "And while the court will hold the use private when it appears that the government or public cannot have any interest in it, the legislature, in determining the expediency of declaring a public use, may no doubt take into consideration all the advantages to follow from such action; as the advancement of agriculture, the encouragement of mining and the arts, and the general, though indirect, benefits derived by the people at large from the dedication. It may be that, under the physical conditions existing in some portions of the state, irrigation is not theoretically a 'natural want,' in the sense that living creatures cannot live without it. But its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, than the use

of water by drinking it. The government would seem to have not only a distant and consequential, but a direct, interest in the use. Therefore a public use." Here the use of water for agriculture is held to be a public use. The same authority says: "We are only called on to say that sections of the code which provide for taking water from riparian proprietors (on due compensation to supply farming neighborhoods) are constitutional and valid." In *Barbier v. Connolly*, 113 U. S. 31, 5 Sup. Ct. Rep. 357, (1884,) Justice Field says: "But neither the amendment, [fourteenth amendment to the constitution,] . . . nor any other amendment, was designed to interfere with the power of the state, sometimes called its 'police power,' to prescribe regulations, to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains." "Special burdens are often necessary for general benefit, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects." This was said in passing on and construing the constitutional provision, providing that no one shall be "deprived of life, liberty, or property without due process of law." "Due process of law" was held to mean affecting all alike who were of the same class or similarly situated. Take the case of ditching or draining companies in interior states where there are swamp lands. The owners of the swamp lands are allowed to form ditching companies, and drain their lands and the lands of their neighbors, and assess their neighbors *in invitum* for the expenses incurred, and in some instances, as I have before said, selling at a sacrifice, the lands of their neighbors to meet the assessments. The ditches limited in some cases to little farming neighborhoods, comprising fewer in number than thirteen. No doubt these laws were first enacted on the theory of the general health, and may have been continued on that pretense long after everybody understood that the increased productiveness of the soil and the enhanced value of the lands constituted the *primum mobile* of the stock-

holders in the companies. These laws have been upheld in states where the judiciary might say it was a startling proposition to assert that one man might invoke the state's power of eminent domain to convey water over another man's land, paying him ample compensation therefor. In the one case a mere right of way, a slender strip of land, is taken,—is appropriated,—and compensation made therefor; in the other, a ditch or drain is made *in invitum*, and the benefits assessed by others, and must be paid or a forced sale result. Why should the first proposition be startling and the second accepted and approved?

In the state of Nevada it has been held that the law authorizing the condemnation of land to give access to mines, and to enable miners to carry on the business of mining, is constitutional. *Mining Co. v. Seawell*, 11 Nev. 402. In *Mining Co. v. Corcoran*, 15 Nev. 147, it was held constitutional to authorize the condemnation of lands for the purpose of operating a mine. In Colorado, statutes have been passed authorizing the appropriation of water by individuals for irrigating, and also the right to condemn land for right of way for irrigation. *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *Schilling v. Rominger*, 4 Colo. 100. I refer to these Nevada and Colorado cases as authority direct on the question involved in this case.

An examination of these cases, the mill-site, the mining cases, the water cases, discloses the fact that the legislatures of various states have clothed private corporations and individuals with the power of eminent domain to make available the extraordinary natural resources within their borders. In a great number of these instances there is no participation by the general public, and the public use consists in the purely incidental benefits. The peculiar physical conditions, and the great benefit that would result to the general public, seemed to justify a public policy authorizing the taking of private property to promote the general welfare in such cases. In most states, and under ordinary conditions, laws like the mill-site acts, the dam acts, and the acts allowing land to be condemned to facilitate mining, and for irrigation, would not be passed, and might not be thought of sufficient public necessity and importance to be upheld if passed. The conflict in

the authorities may be accounted for in the different conditions that exist in different states. The authorities are numerous that sites for manufacturing may not be condemned, though manufactories are of great public utility, and promote the general welfare in a pre-eminent degree. But the reason given is that a sufficient number of sites can be had by purchase, and without the necessity of condemnation. But a different ruling prevails where manufacturing is done by water-power, and mill-sites are few, as we have seen in the cases before referred to.

All condemnation acts are predicated on the proposition that private ownership must yield to public necessity. "Public necessity" often means, as illustrated in the above instances, public convenience and advantage. We have many other instances of what "public necessity" means. Though telephones are of very recent invention, and reach the very limited few, their use is held to be a public necessity; in other words, public convenience and advantage,—sufficiently so, at least, to justify the exercise of the sovereign power of eminent domain. Natural gas, though limited to localities small in area, is held also to be a public necessity, and therefore to justify the exercise of this extraordinary power. Laws relating to the telephone and natural gas are good illustrations of the adaption of the law to the existing conditions, and the necessity for the enforcement of the doctrine that private property must yield, on compensation being made, to the public welfare. But recently both the telephone and natural gas were unknown, now both are necessary to the public use; that is, we submit to the public convenience and advantage. "Government must adapt itself to the existing condition and wants of society, or its efficiency is destroyed." *Swan v. Williams*, 2 Mich. 438. "This right of resumption [condemnation] may be exercised not only when the safety, but also when the interest, or even the expediency, of the state is concerned." *Beekman v. Railroad Co.*, 3 Paige, 73, 22 Am. Dec. 679. Property may be taken under power of eminent domain, where the use is merely amusement or recreation, as for public drives or parks. *Higginson v. Inhabitants of Nahant*, 11 Allen, 530; *In re Mount Washington Road Co.*, 35 N. H. 134; *In re Bushwick Avenue*, 48 Barb. 9; *County Court v. Griswold*, 58

Mo. 175; *Commissioners v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70.

Speaking of the power of the state to exercise the right of eminent domain in behalf of railroads, Judge Cooley says: "In such cases the property is not so much appropriated to the public use as taken to subserve some general and important public policy." *Ryerson v. Brown*, 35 Mich. 339. Chancellor Kent has written: "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." 2 Kent's Commentaries, 340. I give due weight to the remark of Judge Cooley that "it would not be entirely safe" to apply with "much liberty" the words "in any way"; and the further remark of Judge Cooley that private property may not be taken "for objects which may merely tend to give an aspect of beauty," etc. I have looked into the various instances of the exercise of the right and power of eminent domain in the cases before cited, to ascertain whether it is necessary that the property appropriated should be actually appropriated to a direct public use, or to some use in which the general public might participate, as in the cases of railroads and canals, or whether the requirements of the constitution might not be met, if the use was in pursuance of some general and important public policy. In other words, may a state or territory, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation? This territory is vast in extent, and rich in undeveloped natural resources. Mountains and deserts are not an inviting prospect, when viewed by a stranger in transit. But the mountains abound in the precious metals, gold and silver, "the jewels of sovereignty"; and the deserts may be made to "bloom and blossom as the rose." The one great want is water. With this resource of nature made available, the mountains and the deserts may be made to yield fabulous

wealth, and Arizona become the home of a vast, prosperous, and happy people. But with water in this territory "cribbed, cornered, and confined" it will continue and remain the mysterious land of arid desert plains, and barren hillsides, and bleak mountain-peaks. The legislature of the territory, seeing what was apparent to all, adopted at an early day a policy,—“a general and important public policy.” That policy was to protect against private ownership and monopoly the one thing indispensable to the growth, development, and prosperity of the territory,—the element that would serve to uncover the gold and silver hidden in the hills and mountains, and transform the desert into a garden. Section 22 (Rev. Stats., sec. 2863) of the bill of rights provides “All streams, lakes, and ponds of water capable of being used for the purposes of navigation or irrigation are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose.” Section 3198 of the Revised Statutes provides: “The common-law doctrine of riparian rights shall not obtain or be of any force or effect in this territory.” Then provision is made for public and private *acequias*. Section 3201 of the Revised Statutes of Arizona: “All the inhabitants of this territory, who own or possess arable or irrigable lands, shall have the right to construct public or private *acequias*, and obtain the necessary water for the same from any convenient river, creek, or stream of running water.” Section 3202 provides: “Whenever such public or private *acequias* shall necessarily run through the lands of any private individuals not benefited by said *acequias*, the damage resulting to such private individuals on the application of the party interested shall be assessed by the probate judge of the proper county in a summary manner.” These provisions were enacted early in the history of the territory, and probably existed as they are now when the territory was a part of old Mexico. The intention was to make the use of water, as much so as practicable within the reach of all, and to guard it against monopoly by private ownership on the one hand, and against being hemmed in by the ownership of the adjacent land

liable to be acquired and held by speculators, on the other hand. The wisdom of this policy, under the physical conditions existing in the territory, must be apparent to every one. What better illustration could we have than the present case? Eight thousand acres of desert land can be brought under cultivation if the right of way can be obtained over intervening land; the value of the land taken is \$124.50, which the owner of the land receives. What was the policy? Private ownership and monopoly of the streams, lakes, and ponds was prohibited. They were reserved for and dedicated to the people. To make the water of these streams, lakes, and ponds available, the right of way must be provided for ditches and canals over the lands of those who might become the owners of the soil on the borders of the streams or the margins of the lakes and ponds. Without this provision it is easy to see how a few individuals might throw themselves across the pathway of progress and development by acquiring the lands on the margins of the streams and around the lakes and ponds. The water intended for the free and general use would be surrounded, hemmed in, and without a right of way available under the law the vast tracts of land lying on the outside must forever remain desert, or pay the tribute of extortionate and unconscionable demands. To prevent this, the laws above mentioned were enacted at the very beginning, and before titles were acquired. The laws of the territory, on the subject of water and water-rights, are not peculiar to this territory. Similar laws exist in Nevada, Montana, Colorado, Idaho, Dakota, and New Mexico. The legislatures of all these states and territories have by their enactments declared their belief in the constitutionality of these laws, and in none of them have the courts held otherwise. It is in the first instance for the legislature to declare what are public uses to which private property may be appropriated. If a law declaring such uses, and making provision for such appropriations, is not in contravention of some constitutional provision, it is the duty of the courts to recognize and enforce it. If there is a doubt as to its constitutionality; if not clearly unconstitutional, being the act of the law-making power and a co-ordinate branch of the government,—it is well settled that it is the duty of the courts to

treat and enforce it as a valid law. If the law is unwise in its provisions, or oppressive in its operation, the power that created it must be looked to to repeal or modify it. In this case the proceeding is in the name of the territory of Arizona, by James C. Goodwin as its agent. It conforms to the requirements of the statutes, and is not in contravention of the constitution of the United States, or the organic act of the territory, or any act of Congress. The judgment below is therefore affirmed.

Sloan, J., and Kibbey, J., concur.

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[Civil No. 299. Filed January 24, 1891.]

[32 Pac. 263.]

SOL. LEWIS, Plaintiff and Appellee, v. C. T. HAYDEN  
et al., Defendants and Appellants.

1. **NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER—PARTNERSHIP NOTE—EXECUTED WITHOUT CONSENT OF ALL PARTNERS VALID.**—The holder of a promissory note, executed by the member of a trading partnership having charge of its financial affairs to secure an extension on a loan made to another of the partners for the use and benefit of the firm, is a *bona fide* holder for value, though as between the partners the note may have been for the accommodation of the individual partner, without consideration, and made without the consent of the remaining partner.
2. **SAME—PARTNERSHIP NOTE—EXECUTED BY ONE PARTNER—VALID—INNOCENT HOLDER.**—In the hands of an innocent holder for value a promissory note made by one member of a trading partnership in the name of the firm is valid, notwithstanding it was not made in the usual course of the business of the firm, and that other partners did not give their consent and had no knowledge of its execution.
3. **EVIDENCE—MATERIALITY—PRESUMPTION.**—Objection to a question put to a witness as to whether he did not consider the security for the individual note ample at the time the loan was made properly sustained, as it is to be presumed he did from the fact of the loan being made, and it is not to be considered as tending to show that the firm note was or was not given as additional security at a time months later.
4. **SAME—SAME—CONTRADICTING FACT ADMITTED.**—Evidence that Webster, the partner making the individual note, was indebted to the



firm at the time the note was made, unless the holder knew he was so indebted, would not be material further than as indicating whether the loan was made for his own benefit or for that of the firm, but as it was conceded it was used for the firm it was properly excluded.

5. **SAME—EXPERT TESTIMONY—FAILURE TO QUALIFY—HARMLESS ERROR.**—Where one of the members of the firm had testified that certain words had been substituted for others originally upon the note, it was not error for the court to refuse to permit him to testify that the erasures had been made with a chemical, he having not qualified as an expert and the firm having had the benefit of his positive testimony as to the change.
6. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE—DILIGENCE.**—A motion for new trial based upon newly discovered evidence is properly overruled where it appears that the evidence would have been merely cumulative and would not have changed the result of the trial, and the affidavits in support thereof fail to show diligence in the procurement of the evidence.

**APPEAL** from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. **Affirmed.**

The facts are stated in the opinion.

L. H. Hawkins, and Goodrich & Street, for Appellants.

The contention of the Charles T. Hayden Milling Company is that the note sued upon, although bearing its signature, is a fraud upon it. It shows upon its face that it is made by one partner to another, and the law is well settled that in such cases the person dealing with it must do so upon inquiry, whether the note has received the sanction of every member of the firm, or is for the benefit of the firm. Cary on Partnership, 42, 5 Law Library, p. 17; 1 Daniel on Negotiable Instruments, secs. 365, 366; Colebrook on Collateral Securities, sec. 54; Parsons on Partnership, secs. 200-205; *Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251; *Rogers v. Bathelor*, 12 Pet. 221-231.

Baker & Campbell, for Appellee.

“A partnership cannot impeach a note signed with its firm name by one partner, when its course of business has been such as to induce an honest belief in the payee who, a prudent

man, and familiar with the manner of conducting its affairs, believed and had a right to believe from his own knowledge of such conduct, that the partner had authority to sign." *Kelton v. Leonard*, 54 Vt. 230.

"Money obtained on the personal credit of a partner which goes into the firm's funds and is used for the exclusive benefit of the firm is a good consideration for a subsequent promise of the firm to pay the debt." *Siegel v. Chidsey*, 28 Pa. St. 279, 70 Am. Dec. 124.

But admitting that this note was made outside of the partnership business and one of the firm did not consent, it is nevertheless valid in the hands of a *bona fide* holder for value. *First Nat. Bank v. Morgan*, 73 N. Y. 587; *Duncan v. Clark*, 2 Rich. 587; *Handelman v. Bank*, 28 Pa. St. 440, 70 Am. Dec. 142; *Collier v. Gross*, 20 Ga. 1; *Boardman v. Gose*, 15 Mass. 331; *Rich v. Davis*, 4 Cal. 22.

The rule is the same even though this note was an accommodation note. *National Bank v. Morgan*, 73 N. Y. 587; 1 *Lindley on Partnership*, p. 296.

Was the plaintiff a *bona fide* holder for value? He received the Hayden note before maturity. He is presumed to be a *bona fide* holder. *Luning v. Wise*, 64 Cal. 410, 1 Pac. 495, 874; *Palmer v. Goodwin*, 5 Cal. 458, 459. Further than this, he received it as collateral security for a pre-existing debt. This makes him a holder for value. *Colebrook on Collateral Securities*, sec. 18; *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14; *Daniel on Negotiable Instruments*, sec. 830.

PER CURIAM.—Appellee, Sol. Lewis, brought suit against C. T. Hayden, A. J. Peters, and A. C. Webster, partners doing a mercantile business under the firm name of Charles T. Hayden Milling Company, upon the following promissory note: "No. 6,186. Phoenix, Arizona, August 20th, 1888. On the 18th day of November, A. D. 1888, without grace, for value received, we promise to pay to the order of A. C. Webster, at National Bank of Arizona, four thousand dollars in U. S. gold coin, with interest thereon at the rate of one and one half per cent per month from date until paid. Interest payable monthly. Note and mortgage, A. C. Webster.

[Signed] Chas. T. Hayden Milling Company. A. J. Peters." The complaint alleges an assignment and delivery by Webster, the payee therein, to the plaintiff, for a valuable consideration. The answer denied the execution of the note by the Charles T. Hayden Milling Company, and alleged that it was executed by A. J. Peters, one of the partners of said firm, without consideration, for the accommodation of A. C. Webster, another partner, to be used by Webster in his private affairs, and without the knowledge or consent of Charles T. Hayden, the remaining partner in said firm; that said note was left by Webster with the National Bank of Arizona for the purpose of representing to others his financial worth, and that thereafter he indorsed the same, but instructed the bank not to collect the note unless so directed by him; that Webster never instructed the collection of the note, but directed that it be given up to the Charles T. Hayden Milling Company; that said bank delivered said note to the plaintiff, Lewis, who held the same as collateral security on a pre-existing debt owing him from Webster, which was already secured by a mortgage on property of Webster's; that none of these acts were ratified by the partner Hayden. The cause was heard by the court without a jury, and judgment entered for appellee. A motion for a new trial having been overruled, the defendant appealed.

The first assignment of error upon which we are asked to reverse the judgment and grant a new trial is "that the court erred in its judgment as to the legal effect and sufficiency of the evidence, and in considering the same sufficient to find for the plaintiff in any amount." In addition to the note, the only evidence offered by the appellee was the testimony of George W. Hoadley, the cashier of the National Bank of Arizona, who testified to the circumstances connected with the execution of the note and its transfer to the appellee. He stated in substance, that on the 22d of May, 1888, Webster, as a partner in the firm of Hayden & Co., applied to witness, as the agent of appellee, for a loan of four thousand dollars for the use of the firm. The security offered by him being unsatisfactory, Webster gave his individual note, secured by a mortgage on his own property, and received the amount applied for from appellee. That the money so borrowed by

Webster was at once placed to the credit of Hayden & Co. at the said National Bank of Arizona, and checked out by A. J. Peters for the use of said firm. That at the end of each month thereafter the appellants were charged with the interest on this note of Webster's and had notice given to them of this fact, and that interest so charged was paid by said firm. That a short time before the note became due Webster came to the bank, and asked witness, as the agent of appellee, for an extension of three months' time on his note, and promised to give the note in suit as additional security in consideration of such extension. That, in pursuance of such promise, Webster appeared with A. J. Peters, a member of the firm, who was known to Hoadley to have charge of the financial affairs of the firm, and authorized to sign its name to the firm's paper, and that Peters then executed the note in question in the name of the firm, and that Webster there and then indorsed the same, and turned it over to witness as the agent of appellee, to be by him held as additional security to the Webster note. The evidence produced by the defense establishes, rather than otherwise, the *bona fide* nature of the transaction, at least on the part of Hoadley. Peters, while on the stand, corroborated the statement of Hoadley that the money borrowed on the Webster note was for the benefit of the firm, and admitted to having been a member of the partnership, intrusted with the signing of the firm's name to its paper; and that at the time the note in question was executed nothing was said from which Hoadley might infer that the note was anything else than what it appeared on its face to be,—the valid obligation of the firm,—and made upon good consideration. It follows, therefore, that it is immaterial what may have been the real transaction relative to the execution of the note as between the partners constituting the firm of Hayden Milling Company. The law is well settled that in the hands of an innocent holder for value a promissory note made by one member of a trading partnership in the name of the firm is valid, notwithstanding it was not made in the usual course of the business of the firm, and that other partners did not give their consent and had no knowledge of its execution. *Bank v. Morgan*, 73 N. Y. 593; *Haldeman v. Bank*, 28 Pa. St. 440, 70 Am. Dec. 142; *Boardman v. Gore*, 15 Mass.

331; *Rich v. Davis*, 6 Cal. 141. Even if it were true that the note was signed in the firm name by Peters for the accommodation of Webster, without consideration, and without the knowledge or consent of Hayden, the remaining partner, these circumstances not being known by Hoadley at the time of the execution and indorsement, and nothing appearing upon the face of the note to put him upon inquiry, appellee became an innocent holder for value upon the extension of the time for payment of the note held by him against Webster, and was entitled to recover from appellant. The fact that the promissory note was made payable at the expiration of three months' extension upon the Webster note, and the further fact that in the note itself were written the following words: "Note and mortgage, A. C. Webster," are sufficient in themselves to negative the statement of Webster that the firm note was assigned by him to Hoadley for collection, and not to be held by him, as appellee's agent, for additional security for his own note. We find, therefore, no error in the court rendering judgment upon the evidence as presented by the record.

Several errors are assigned in the rulings of the court upon the introduction of evidence. The first of these relates to the cross-examination of the witness Hoadley. The witness was asked by counsel for appellant "if at the time he took the note and mortgage from Webster for Lewis he did not consider the mortgage ample security?" Why counsel seriously should claim the ruling of the court in sustaining the objection to this question to be error, is not clear to us. It is to be presumed that the witness did so consider the mortgage from the fact that he loaned the amount mentioned in the note upon the strength of the security taken. Nor is it to be considered as tending in any way to show whether the subsequent note was or was not given as additional security to the first note, given months after its execution. Appellant attempted to show by the witness Peters that Webster was indebted to the firm of C. T. Hayden Milling Company at the time he obtained the loan from appellee. This evidence was excluded by the court, and this ruling is made the ground of another assignment of error. This evidence, unless it were shown that Hoadley, as the agent of appellee, knew that he

was so indebted, would not be material further than as indicating whether the loan was made for his own benefit or for that of the firm; but as Peters had previously stated that the four thousand dollars had been used by the firm, and that this fact was known to Hoadley, he would be estopped from showing, as a member of the firm, that the transaction was otherwise than what it appeared to be. The appellant chiefly relies upon the rulings of the court as presented by bill of exceptions No. 6 in the record as error sufficient to reverse the judgment. The witness Peters stated on the stand that at the time he signed the note sued upon the words, "Note and Mortgage, A. C. Webster," did not appear upon it; that afterwards he saw the note, and it then had on it the words, "Additional security, Crissmon ranch." He was asked by counsel for appellant whether he was familiar with book-keeping and handwriting and the making and alteration of instruments and erasures and interlineations, to which he replied that "he was somewhat." He was also asked whether there was a preparation made for the erasure or blotting out of anything written, and whether he had seen its application, to which he replied that he had, and that he had some of the preparation in his possession; whereupon the counsel asked him if there had been any use of that chemical upon the note. This question was objected to, and the objection sustained by the court. Counsel then excepted, and stated that he wanted to prove the words, "Additional security, Crissmon ranch," had been erased, and the words, "Note and mortgage, A. C. Webster," put in its place. The court then said "it would not be a material alteration." The ruling of the court refusing to permit the witness to answer the question might be sustained on various grounds. In the first place, the question was suggestive and leading. Then, again, he had not sufficiently qualified himself as an expert to answer the question, and it did not appear that he had sufficient knowledge, based upon an inspection of the note, to testify concerning the fact. If it were sought by this question (which is not clear) to elicit from the witness testimony to prove that an alteration had been made, the note itself would have been the best evidence of any erasure, or the use of any chemicals upon it. The note was not offered in evidence, nor was any other

testimony proffered by counsel upon this point, nor was it suggested that the note bore any evidence of an erasure or alteration, for the purpose of showing that the words, "Note and mortgage, A. C. Webster," were not upon the note when executed. The direct and positive statement of the witness that the words were not there when he signed the same, but that afterwards he saw the words, "Additional security, Crissmon ranch," thereon, rendered the mere opinion of the witness, even if competent, based upon slight circumstances of discoloration or other evidence of the use of a chemical, of little or no additional value; and, besides, these appellants had thus the full value of the testimony of the witness as to the fact that an alteration had been made upon the face of the note. We find no errors in the rulings of the court upon the exclusion or rejection of evidence.

We have examined with care that part of the motion for a new trial based upon newly-discovered evidence, and the affidavits in support thereof. The showing is insufficient, in that much of the newly discovered evidence would have been cumulative merely, and would not have changed the result of the trial. Besides, the affidavits fail to show diligence in the procurement of the evidence. The motion, therefore, was properly denied.

The judgment is affirmed.

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[Civil No. 287. Filed January 29, 1891.]

[73 Pac. 443.]

A. J. DORAN, Administrator of the Estate of W. A. Robart, Deceased, Plaintiff and Appellee, v. JOHN C. LOSE, Defendant and Appellant.

1. APPEAL AND ERROR—JURISDICTION—MOTION FOR NEW TRIAL—FAILURE TO FILE IN TIME.—This court has no jurisdiction to reverse the judgment of the trial court, appellant not having his motion for a new trial disposed of at the term when the judgment was rendered and not having executed his bond on appeal within twenty days of the close of the term.

2. **SAME—PRESUMPTIONS—END OF TERM—COMPARE PUTNAM v. PUTNAM, ANTE, P. 182, 24 PAC. 321.**—This court takes judicial notice of the fact that presumptively a term of court ends on the day prior to the beginning of a new term.

**APPEAL** from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. William W. Porter, Judge. **Affirmed.**

The facts are stated in the opinion.

Baker & Campbell, for Appellant.

W. R. Stone, E. J. Edwards, and Barnes & Martin, for Appellee.

**PER CURIAM.**—This action was to remove a cloud on the title of the appellee, as administrator of the estate of W. A. Robart, deceased, to a half interest in the Boomerang Mine, situate in Pinal County, Arizona. The case was tried below by the judge without the intervention of a jury.

The appellant, by his attorneys, presents with great force and ability legal objections to certain proceedings in the trial court, which it is urgently claimed should cause a reversal by this court of the judgment rendered in the case by the court below. We have read and considered the evidence, and, taking it all into consideration, have reached the conclusion that justice was done between the parties. If there are technical objections to parts of the proceedings, well taken at the time (which we do not decide), the record makes these objections unavailing to reverse what we consider a right and just judgment, for the record also discloses that the appellant did not have his motion for a new trial disposed of at the term of court when the judgment was rendered; nor did he execute bond for an appeal within twenty days of the close of the term. The judgment was rendered on the sixth day of February, 1889. The motion for a new trial was filed February 7, 1889. The court takes judicial knowledge of the fact that presumptively (the record not showing to the contrary) the term of court ended the day before the first Monday of April, 1889; that being the day of the beginning of a new term. (Compare *Putnam v. Putnam*, ante, p. 182, 24 Pac. 321.) The



motion for a new trial was disposed of on the twelfth day of April, 1889. The bond on appeal was executed on the second day of May, 1889, and approved and filed on the twenty-second day of May, 1889. It is thus apparent that we have no jurisdiction to reverse the judgment rendered in the case by the trial court.

Sloan, J., took no part in the consideration of this case.

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[Civil No. 266. Filed January 24, 1891.]

[29 Pac. 14, *sub nom.* Crowley, Auditor, v. Reilly.]

JAMES REILLY, Plaintiff and Appellee, v. M. G. CROWLEY, Auditor and ex-officio Recorder of the City of Tombstone, Defendant and Appellant.

1. APPEAL AND ERROR—BOND—JURISDICTION—REQUISITES—REV. STATS. ARIZ. 1887, PAR. 859, CONSTRUED.—The execution and filing of a proper appeal bond is prerequisite to the appellate jurisdiction of this court. Where it fails to conform substantially to the statute, *supra*, names no obligee, is not in a sum at least double the probable amount of costs in both the appellate and lower courts, and is not conditioned that the appellant shall prosecute his appeal with effect, the appeal will be dismissed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. William H. Barnes, Judge. Dismissed.

The facts are stated in the opinion.

George G. Berry, for Appellant.

James Reilly, for Appellee.

PER CURIAM.—The appellee moves the court to dismiss the appeal because of certain defects in the appeal-bond. The instrument purporting to be a bond begins with a recital of the fact that the defendant below was about to appeal from the judgment rendered against him in the action; that the clerk had fixed the probable costs of the appellate court at

forty dollars. It then proceeds: "Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, residents and freeholders of the county of Cochise, do hereby jointly and severally undertake and promise on the part of the defendant and appellant that the appellant will pay all damages and costs which may be awarded against him on the said appeal, not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves severally and jointly bound." The statute makes the execution and filing of a proper appeal-bond prerequisite to the appellate jurisdiction of this court. Paragraph 859 of the Revised Statutes of 1887 provides that the bond shall be "payable to the appellee or defendant in error in the sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the appellate court." The use of the word "or" in the last clause is evidently inadvertent, and should be read "and." The instrument purporting to be an appeal-bond in this case clearly does not substantially conform to the requirements of the statute. There is no obligee named; the bond is not in a sum at least double the probable amount of costs in both the appellate and the lower courts; it is not conditioned that the appellant shall prosecute his appeal with effect. Moreover the language employed is ambiguous, in that it is difficult to say whether it is intended that only in the event that the damages and costs do not exceed three hundred dollars shall the obligors be bound at all, or that it is intended that the liability of the obligors is to be limited to the sum named. We have passed on these questions recently, and hope not to have occasion to do so again. Adherence to the very simple and plain requirements of the statute is not difficult, and no good reason can be given for so radical a departure therefrom as in this case. The appeal is dismissed, and there will be judgment accordingly.

[Criminal No. 66. Filed February 7, 1891.]

[28 Pac. 1134, *sub nom.* Kirby v. Territory.]

TERRITORY OF ARIZONA, Respondent, v. JOSEPH KIRBY, Appellant.

1. RAPE—ASSAULT WITH INTENT TO COMMIT—EVIDENCE—COMPLAINT OF PROSECUTRIX.—In a prosecution for assault with intent to commit rape evidence that the prosecutrix made complaint should be limited to that fact. Evidence as to the details of such statement inadmissible.
2. APPEAL AND ERROR—RECORD—GRAND JURY.—The objection, raised for the first time on appeal, that the indictment was found by a grand jury of less than the statutory number of jurors, cannot be considered, as the statute limits the record, so far as the jury is concerned, to challenges to the panel or to individual grand jurors.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge. Reversed.

Allen R. English, for Appellant.

The court erred in allowing the witness Mrs. Wilson to testify to conversations had with the prosecutrix, and to the statements made to the witness by the prosecutrix, shortly after the alleged assault was made, at the house of Mrs. Wilson, over the objections of defendant.

Mr. Wharton, in his work on Criminal Evidence (sec. 273) says: "In prosecutions for rape, where the injured party is a witness, it is material to show that she made complaint of the injury while it was yet secret. Proof of such complaint, therefore, is original evidence; but whether the statement made by the prosecutrix of details and circumstances is admissible has been doubted," and at section 264, he says: "The rule before us, however, does not permit the introduction, under the guise of *res gestæ*, of a narrative of past events, made after the events are closed, by either the party injured or by bystanders," citing a long list of American and English authorities. In his work on Criminal Law, (sec. 566) he says: "... the particulars of her complaint have been held not

to be evidence, except to corroborate her testimony *when attacked*," and then he says further, "And in any view, such statements cannot be received as independent evidence to show who committed the offense," citing numerous authorities.

The evidence of prosecutrix had not been attacked—no witness for the defense had been sworn at the time Mrs. Wilson was permitted to narrate the statements—it was not in rebuttal, but was permitted to go to the jury as a part of the case in chief for the prosecution.

In the case of *People v. Ah Lee*, 60 Cal. 85, the supreme court reversed the judgment of conviction because the district attorney was permitted to ask the question of a witness, "Have you told all that you heard either of the parties (deceased or defendants) say at the time of the stabbing or immediately after?"

See, also, *People v. Swenson*, 49 Cal. 388; *People v. Ehring*, 65 Cal. 135, 3 Pac. 606; *People v. Wasson*, 65 Cal. 538, 4 Pac. 555.

In the case of *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126, 6 Pac. 691, the defendant was convicted of rape, and the court, in reviewing all the authorities on the subject, quotes as follows from Russell on Crimes: ". . . it has been the invariable practice not to permit either the prosecutrix or the person so called to state the particulars of the complaint in chief." Following that case the same court, in 1885, in the case of *People v. Tierney*, 67 Cal. 55, 7 Pac. 37, says, in affirming this doctrine: "On the trial of the defendant, who was charged with the crime of rape, the prosecutrix was permitted, against the objection and exception of defendant, to give in evidence the particulars of the complaint which she testified she made to Mrs. Kiely shortly after the occurrence. This was held erroneous by this court in the recent case of *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126, 6 Pac. 691. On the authority of that case the judgment and order are reversed and the cause remanded for a new trial."

See *People v. Davis*, 56 N. Y. 101; *Greenfield v. People*, 85 N. Y. 88, 39 Am. Rep. 636; *Waldele v. New York etc. R. E. Co.*, 95 N. Y. 274, 47 Am. Rep. 41; *People v. Simonds*, 19 Cal. 275.

In *Insurance Co. v. Mosely*, 8 Wall. 397, the narrative was

received, but it did not tend to criminate a third person, and the court there went to the extreme in permitting its admission. *People v. Davis*, 56 N. Y. 102.

And the great preponderance of American authorities is, that they are inadmissible where they tend to criminate a third person in his absence. Cases *supra*, and 1 Greenleaf on Evidence, sec. 119.

And the confession of a party that he is a bigamist is not admissible in suit between third parties. *Gaines v. Relf*, 12 How. 472; *Campbell v. Shivers*, 1 Ariz. 161, 25 Pac. 540; 7 Am. & Eng. Ency. of Law, p. 52, and note, and cases cited. Also showing that the particulars of the complaint are inadmissible.

Clark Churchill, Attorney-General, W. H. Stilwell, District Attorney, and Abram Humphries, for Respondent.

Exception is taken to the testimony of Mrs. Wilson as to "statements made by the prosecutrix to her, shortly after the alleged assault." There are many authorities which hold that such evidence is inadmissible, and there are many which hold that it is admissible. The leading case against the admission of such evidence is that of *Rex v. Bedingfield*,<sup>14</sup> Cox Crim. Cases, 341. The value of that case as an authority has been impaired by impeaching criticism, coming from the secular press, as well as the profession. And so violent were the assaults made upon it that the Lord Chief Justice of England, who wrote the opinion, deemed it necessary to defend his position in a pamphlet of twenty-four pages. Mr. J. Pitt Taylor (author of the Law of Evidence) replied to his Lordship's monogram in a three-column article in the London *Times*. Mr. Taylor says: "The cases of *Rex v. Foster*, and *Thompson v. Trevanion* are cited as unshaken decisions by Starkie, Phillips, Roscoe, Archibald, Goodsoe, Norton, and last, though not least, by Mr. Justice J. Fitzjames Stephen in his able Digest of the Law of Evidence." And these cases favor the admissibility of such evidence. Mr. Taylor cites no other cases. "I might," he says, "here add a cloud of other authorities, but I refrain, for if your lordship is not convinced by the authorities I have cited, neither would you be persuaded though I brought to your notice a dozen more."

Bedingfield's case is also criticised in an elaborate article in volumes 14 and 15 of the *American Law Review*, the article being written by Professor James W. Thayer, of the Harvard Law School.

In this country in the great majority of cases, the supreme courts have declined to pass upon the admissibility of such evidence, leaving it entirely to the discretion of the *nisi prius* court. And Greenleaf says that is the proper practice. 1 Greenleaf on Evidence, sec. 108.

There are a number of eminently respectable authorities which hold, without equivocation, that evidence, such as was heard by the court below in this case, is entirely competent. The leading case is *Burt v. State*, 23 Ohio St. 204; followed by *Brown v. People*, 36 Mich. 204; *McDowell v. Goldsmith*, 6 Md. 319, 61 Am. Dec. 310; *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 839; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519.

SLOAN, J.—The appellant was convicted at the special September term, A. D. 1890, of the district court of Cochise County, of the crime of assault with intent to commit rape. The principal assignment of error, and the one upon which appellant chiefly relies, relates to the admission in evidence of certain statements made by the prosecutrix as to the alleged assault made upon her by appellant, and the particulars thereof, soon after the offense, to one Mrs. Wilson. The record discloses that Mrs. Wilson was permitted, over objection, to testify somewhat in detail as to the statements made to her by the prosecutrix soon after the alleged assault as to what occurred between her and the appellant. Although there is some conflict of authority as to the admissibility of such evidence in cases of rape or assault to commit rape, the great weight of authority, both in this country and in England, is against the admission of anything more than the fact that complaint was made of the injury by the prosecuting witness. The evidence of the complaint is not admitted as a part of the *res gestæ*, nor as evidence of the guilt of the defendant, but merely in corroboration of the prosecuting witness in the sense that it removes from her testimony a suspicion that might otherwise rest upon it, unless it were shown

that she did what would naturally have been done by a chaste woman under like circumstances,—viz., made known the fact of the injury done her. Greenleaf, in his work on Evidence (vol. 3, sec. 2131), says: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached." To the same effect, see Roscoe on Criminal Evidence, sec. 23; 2 Bishop on Criminal Procedure, 963; 1 Phillips on Evidence, 184, and cases therein cited. In Ohio, followed by Michigan and a few other states, the rule is that it is in the sound discretion of the trial court, in allowing testimony as to the fact of complaint made by the prosecutrix, to permit particulars as to her statement; but, as we have before stated, the great weight of authority is in favor of the rule restricting such testimony upon the direct examination of the witness to the simple fact that she made complaint. We think the testimony of Mrs. Wilson as to details of the statement made to her by the prosecutrix relative to the alleged assault should have been excluded, and that its admission was prejudicial to the defendant. The appellant raises in this court for the first time the objection that the indictment was found by a grand jury composed of fifteen grand jurors, and not of the statutory number of not less than seventeen nor more than twenty-three. Our statute does not make the organization of the grand jury a part of the record, but, on the contrary, limits the record, so far as the grand jury is concerned, to challenges to the panel or to individual grand jurors. The question raised is not, therefore, before us upon this appeal.

For the error in the admission of evidence before mentioned judgment is reversed, and the cause remanded for a new trial.

[Civil No. 284. Filed February 9, 1891.]

[30 Pac. 303, *sub nom.* Stewart v. Albuquerque National Bank.]

**THE ALBUQUERQUE NATIONAL BANK, a Corporation,  
Plaintiff and Appellee, v. W. G. STEWART et al., De-  
fendants and Appellants.**

1. **PLEADING—ANSWERS—DEFENSES—ELECTION.**—A plea cannot rest in fraud and contract at one and the same time, and both or either relied upon at the option of the pleader.
2. **SAME—SAME—SAME—FRAUD—NECESSARY AVERMENTS.**—An answer setting up that the cashier of a bank represented to defendants, sureties upon a note, that the bank held certain collateral of the principals which it would apply to its payment and save them harmless, and that upon such agreement they were induced to and became sureties, does not raise the defense of fraud or fraudulent representations, because there is no allegation that the representations were untrue, nor that, relying upon such representations, they were thereby induced to become sureties, and would not otherwise have so become.
3. **SAME—SAME—CONSTRUCTION.**—An answer containing elements of contract and fraud which fails to contain averments essential to the plea of fraud will be construed upon the theory of contract.
4. **SAME—SAME—DEFENSES—NEGOTIABLE INSTRUMENTS—CONTEMPORANEOUS PAROL AGREEMENT VARYING.**—An answer to a suit upon a note, setting up a contemporaneous parol agreement between the cashier of a bank and sureties upon the note to make the note out of collateral held by the bank and to save them harmless, is bad as varying the terms of a written undertaking.
5. **BANKS AND BANKING—CASHIERS—REPRESENTATIONS BY—WHEN BINDING UPON BANK—DEFENSE.**—In the absence of affirmation of existing facts a promise made by the cashier of a bank to parties about to become sureties, that their contract of suretyship would not be enforced against them, is a mere matter of form, and will not bind the bank. If the affirmations were relied upon the plea should be in fraud.
6. **APPEAL AND ERROR—ASSIGNMENT OF ERRORS—EXCLUSION OF EVIDENCE—MUST BE SAVED BY MOTION FOR NEW TRIAL.**—An assignment of error based upon the exclusion of evidence is not well taken where exclusion of evidence is not set out in the motion for new trial as a ground therefor.
7. **SAME—RECORD—WAIVER OF ERRORS—INSTRUCTIONS—MUST BE IN RECORD—FAILURE TO NOTE IN BRIEF.**—Where error is assigned in



the overruling of appellants' motion for new trial for reasons therein stated, and it appears that one of the grounds is the refusal to give an instruction, such error is waived by failure to include it in the record. Even if in the record, it would be considered as waived as counsel do not complain thereof in their brief.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Affirmed.

The facts are stated in the opinion.

Stewart & Doe, and Baldwin & Johnston, for Appellants.

The cashier was acting within the scope of his authority when he stated that the bank held collaterals of the principal, and his promise to hold them to meet the note was binding upon the bank. *Packard v. Herrington*, 41 Kan. 469, 21 Pac. 621; *Merchants' Bank v. State Bank*, 10 Wall. 646-650; *Cocke v. State Nat. Bank*, 52 N. Y. 97, 11 Am. Rep. 667; Story on Agency, sec. 114; Angell and Ames on Corporations, sec. 297.

"Parol evidence is admissible on part of surety on note, to show that the payee to induce him to become such surety, represented that he had in his hands funds belonging to the principal in the note, which should be applied as a credit thereon; and if the proofs establish such facts, the surety is entitled to the benefit of such assurance." *Matthewson v. Jones*, 30 Ga. 606; *Taylor v. Scott*, 62 Ga. 42.

"The general doctrine is well settled in *Pickard v. Sears*, 6 Ad. & E. 469, by Lord Denman, in these words: 'When one by his acts or conduct willfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, or to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time.' *Odlin v. Gore*, 41 N. H. 465, 77 Am. Dec. 775. See, also, 5 Wait's Actions and Defenses, p. 202, sec. 7; *Evans v. Kneeland*, 9 Ala. 42; *Drew v. Kimball*, 43 N. H. 282, 80 Am. Dec. 163; *F. & M. Bank v. B. & D. Bank*, 14 N. Y. 623, 16 N. Y. 125, 69 Am. Dec. 678, and note; *Mead v. Merchants' Bank*, 25 N. Y. 148, 82 Am. Dec. 331; *Barnes v. American Bank*, 19

N. Y. 159-162; *Carpenter v. King*, 50 Mass. 511, 43 Am. Dec. 405; *Bal. Sta. Bank v. Marine Bank*, 16 Wis. 139; *Chambers v. Cochrane*, 18 Iowa, 166; *Port v. Robbins*, 35 Iowa, 212; 1 Greenleaf on Evidence, sec. 284; *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Potter v. Merchants' Bank*, 28 N. Y. 649, 86 Am. Dec. 273, and note; *Bank of New York v. State Bank*, 29 N. Y. 619, 633; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 165, 36 Am. Rep. 593."

Herndon & Hawkins, and E. M. Sanford, for Appellee.

Appellants have failed to file with the clerk of the court below an assignment of errors, and failing to file such assignment, distinctly specifying the errors relied upon, as required by paragraph 940, page 196 of the Revised Statutes of Arizona, they thereby waive the right to present any errors upon the trial of this cause to this court.

The above section was taken from the Texas code and by the highest court of that state it has been held that the assignment of errors must be filed in the court below, and errors not contained in such assignment will be considered by the supreme court as waived; and, further, that upon failure to file such assignment of errors, the supreme court, on motion, will affirm the judgment or dismiss the appeal, unless the record discloses error so fundamental that the court would act upon it without an assignment of errors.

In *Murchison v. Holly*, 40 Tex. 439, the court says: "There being no errors assigned, and it appearing from the record that the court had jurisdiction of the subject-matter, and the parties, . . . the appeal will be dismissed." To the same effect, see *Chevallier v. Whittaker*, 8 Tex. 204; *Roy v. Bremond*, 22 Tex. 462; *Geiselman v. Brown*, 30 Tex. 761; *Hamlin v. Taft*, 32 Tex. 491; *Burnes v. Wiley*, 35 Tex. 20; *Railroad Co. v. Scanlan*, 44 Tex. 649.

Appellants allege as their second ground of defense, in their separate answer, that they were promised indemnity on account of collaterals, and that they would not be called on to pay, and that this promise was made to them by the cashier and agent of the plaintiff. This being a prior or contemporaneous agreement or promise, and not in writing, could not avail the appellants. The cashier of plaintiff, even if he

made any such promise or agreement, could not bind the plaintiff; such act would be beyond the scope of his powers and authority as cashier. In other words, that he had no power or authority to agree with the appellants that if they signed the note they would not be held liable thereon. *Bank of United States v. Dunn*, 6 Pet. 51.

In this case the cashier and the president of the bank represented to the indorser that the note was secured by a pledge of stock; that if he would indorse it he would not be held liable; that the indorsement was a mere matter of form. The court says that the object of such testimony was to vary the contract entered into, and to show another contract of an entirely different character, and that such an agreement does not bind the bank, and cannot be proved by parol. *Bank of Metropolis v. Jones*, 8 Pet. 12; *Henderson v. Anderson*, 3 How. 73; *Brown v. Willey*, 20 How. 442; *Specht v. Howard*, 16 Wall. 564; *Forsythe v. Kimball*, 91 U. S. 291; *Brown v. Spofford*, 95 U. S. 474; *Cox v. Bank*, 100 U. S. 713.

And as late as 1881 the court in the case of *Martin v. Cole*, 104 U. S. 41, after reviewing and approving the foregoing line of authorities, says: "This question cannot now be considered an open one in this court, and coincides with the rule adopted and applied in most of the states."

"Parol evidence of an oral agreement alleged to have been made at the time of drawing, making, or indorsing of a bill or note cannot be permitted to vary, qualify, or contradict, to add to or subtract from, the absolute terms of the written agreement. The exceptions to this rule are cases of fraud, illegality, or want of consideration." *Dickson v. Harris*, 60 Iowa, 737, 13 N. W. 336. See, also, *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733, and cases cited.

The evidence of a parol agreement contemporaneous with a written acceptance is properly excluded. *Aultman v. Brown*, 39 Minn. 323, 40 N. W. 159; *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5.

In an action on a promissory note, a charge asking a finding for defendant, if the note was executed with the understanding that it was not to be paid, is properly refused, although evidence has been improperly admitted without ob-

jection to show such parol contemporaneous agreement." *Dolsen v. De Ganahl*, 70 Tex. 620, 8 S. W. 321.

In the case at bar there is no allegation or pretense of fraud, illegality, or want of consideration.

It is well settled that the entire charge must be taken and construed together. *State v. Matthews*, 98 Mo. 125, 10 S. W. 144; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745; *Central R. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276; *Simonton v. Rohm*, 14 Colo. 51, 23 Pac. 86.

WELLS, J.—This was an action in the court below by the appellee against the appellants on a promissory note, which reads as follows: "\$2,500.00. Albuquerque, New Mexico, Aug. 29, 1887. Sixty days after date we jointly and severally promise to pay, to the order of the Albuquerque National Bank, twenty-five hundred dollars at the Albuquerque National Bank, Albuquerque, N. M., with interest at the rate of one per cent per month from date until paid, value received. [Signed] W. G. Stewart. E. S. Clark. W. M. Fain. Thomas F. McMillon. A. Doyle." Judgment on the note for appellee for \$3,037.50. The errors assigned are: 1. The court erred in giving plaintiff instruction No. 1; 2. In excluding from the jury the testimony of the witnesses McMillon and Doyle, which tended to show that Strickler, plaintiff's cashier, stated to the parties upon the note sued on, before and at the time that said sureties signed the same, that plaintiff held sufficient collateral to protect said sureties; and 3. In refusing to grant defendants a new trial for the reasons stated in the motion therefor. Appellants set out in their brief so much of their answer as they deemed necessary to present the issues and show the errors complained of, as follows: "For the second defense to plaintiff's complaint and cause of action therein set up defendants say that, before the signing of the said note by them, or either of them, and up to the signing of the same by each and every one of them, the said plaintiff therein, by its regular agent and cashier, represented and stated to these defendants, and to each of them, that he had for plaintiff, and that said plaintiff had then and there, ample security in the shape of collaterals belonging to said defendants, (Stewart and Clark, who were the principals in said

note,) to secure the payment of said note when due, and to save these defendants, and each of them, from the payment of said note, or any portion thereof; and that said plaintiff did then and there so state to the defendants, and each of them, and promise to them, and each of them, that if they, and each of them, would so sign said notes, as sureties, as aforesaid, that plaintiff would hold said collaterals for the payment of said note, and would apply the proceeds, or such portion thereof as might be required, to the satisfaction thereof; and that the same would not, and never should, become a charge against these defendants, or either of them, nor should they, or either of them, ever be required to pay the same, or any portion thereof; and therefore defendants aver that, upon these terms and conditions, they were induced to sign, and upon these promises, so made by plaintiff, they did sign said note, and upon none others."

This answer contains elements of contract and fraud. Upon which theory was the court to consider it? Upon which theory did the appellants intend the court should consider it? It cannot stand upon both theories at the same time. If the bank represented as a fact, to induce parties to become sureties on a note, that it held collaterals sufficient to pay the note, when in fact it had no such collaterals, and by such misrepresentations of the facts parties did become sureties relying on such representations, and being ignorant of the facts, then an issue of fraud is raised. On the other hand, if the bank stated that it held collaterals as mere inducement to the promise or agreement to hold and apply the collaterals to the payment of the note and the promise or agreement was relied on, another and very different issue is presented. In other words, the plea cannot rest in fraud and contract at one and the same time, and both or either be relied upon at the option of the pleader. That appellants did not rest their defense in their answer on the ground of fraud, or fraudulent representations, we think is quite plain, because there is no allegation that the representation of the bank that it held collaterals was untrue; nor is there allegation that, relying on such representation, they were thereby induced to become sureties on said note, and would not have become sureties but for such representations. The conclusion of the answer

discloses, as we think, that the contract or promise element of the answer is the one relied upon. These are the concluding words: "And therefore defendants aver that, upon these terms and conditions, they were induced to sign, and upon these promises so made by plaintiff they did sign, said note, and upon none others." The words "terms" and "conditions" and "promises" all relate to contract. We will therefore consider the answer in that light. As above indicated, the answer would not be good as a plea of fraud, for the lack of the averment that the statement and representations were relied upon as true, when in fact they were untrue, and defendants were injured thereby. Is it good and sufficient in law on the theory of contract or promise? The written contract (the note) was that the makers would pay the note at the time expressed therein, without qualification or condition. When suit is brought, answer is filed, in substance, that the payee has no right to take judgment against the sureties at least, if we concede they were sureties, because plaintiff below agreed by parol, at the time these defendants signed the note, to use collateral security, which it held, or claimed to have, at the time defendants signed the note as sureties. In other words, part of the contract was in writing, and part was by parol, or there was a contemporaneous collateral parol agreement. The parol agreement varies, if it does not contradict, the written undertaking. On the face of the written undertaking (the note,) there must be payment or judgment. "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note cannot be permitted to vary, qualify, or contradict, or add to or subtract from the absolute terms of the written contract." 2 Parsons on Bills and Notes, 501; *Specht v. Howard*, 16 Wall. 564; *Forsythe v. Kimball*, 91 U. S. 294. The rule, in the language of Greenleaf, is: "The rule, briefly expressed, is, parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." 1 Greenleaf on Evidence, 351. The rule is elementary, and we think it applies in this case, at least, to the promise or contract element of the answer; indeed, the answer goes on the theory of the agreement to apply the collateral, and not to enforce the

note against the sureties. The agreement and authorities contained in appellants' brief are to the effect that the sureties may be relieved from liability by fraudulent representation of existing facts made to induce the contract of suretyship. Appellants, on page 18 of their brief, say: "A contract of immunity from debt is a very different thing from a misrepresentation of facts which induce the assumption of a debt." "The one is simply a void contract; the other, fraudulent misinformation." "This is why the supreme court of the United States, in *Bank v. Dunn*, 6 Pet. 51, and *Bank v. Jones*, 8 Pet. 12, calls the transaction therein referred to 'agreements' and 'contracts'; but would that court call Stickler's information to these sureties, 'There are collaterals in the possession of my bank,' an agreement or contract? In whose language is such information called an agreement? In whose mind is such an attitude of affairs regarded a contract?" These extracts from the brief of appellants are quoted because they distinctly draw the line between the representations of existing facts by the bank on the one hand, and the promises of the bank on the other.

The language and the argument of the brief of appellants, and the authorities therein cited, and the second assignment of error, press the defense on the ground of misrepresentations of existing facts; in other words, fraud. But, as we have before shown, the answer itself goes on the theory of contract; the brief and assignment of errors, on the theory of fraud. We have considered both phases of the answer, that appellants might have the benefit of either. If accepted as a plea of fraud, though we are quite clear that it could not, as a whole, be so considered, the answer is wanting in certain averments, not necessary here to repeat, to make it a good plea of fraud. If accepted as averment of agreement or promise, it would operate to vary or contradict the written undertaking, and could not be proven by parol. We have not so far considered the question of the authority of the cashier to bind the bank by his representations or promises, but, for the purpose of the argument, have treated them as made by the bank. We think it quite clear that any assurance given or promise made by a cashier to parties about to become sureties, that their contract of suretyship would not

be enforced against them, was a mere matter of form, etc., would not bind the bank in the absence of the affirmation of existing facts; and if such affirmations or representations were relied upon, the plea should have been in fraud. We have considered the first assignment of error, namely, the giving of the first instructions, and have reached the conclusion that it—the instruction—expressed the law of the case. We have also considered the second error assigned, by the exclusion of the evidence of McMillon and Doyle, and find no error in the exclusion upon the issues made by the pleadings. We note, in passing, that this second assignment of error is not well taken, for the further reason that the exclusion of evidence is not set out in the motion for a new trial as a ground therefor.

The third assignment of error is that the court erred in refusing to grant defendants a new trial for the reasons stated in the motion therefor. But these reasons were set out in the motion: 1. The court erred in giving in behalf of plaintiff [instructions] from 1 to 13, inclusive. Error was assigned as to No. 1 alone, and this we have considered. 2. In refusing defendants' instruction No. 4. This instruction is not in the record, and consequently cannot be considered. We presume it was omitted for the reason that the ground was covered by other instructions. Counsel in their brief do not complain of the refusal to give this instruction. It would therefore be considered waived if it was in the record. The third ground of motion for a new trial is the modification of the instruction 5 by the court, adding the words, "provided you find he acted in the scope of his authority." In the view of the issues made by the pleadings, this was not error, even if it otherwise would have been. The record discloses no error, nor do we think the defendants have any reason to complain of the admission or rejection of evidence, nor of the instructions of the court taken as a whole. The judgment below will stand affirmed.

Gooding, C. J., Sloan, J., and Kibbey, J., concur.



[Civil No. 300. Filed February 9, 1891.]

[26 Pac. 310.]

THE TERRITORY OF ARIZONA, Plaintiff and Appellee, v. THE DELINQUENT TAX-LIST OF THE COUNTY OF MARICOPA FOR THE YEAR 1888. MARICOPA AND PHCENIX RAILROAD COMPANY, Defendant and Appellant.

1. TAXATION—PROPERTY WITHIN EXCLUSIVE JURISDICTION OF UNITED STATES—CANNOT BE TAXED BY TERRITORIES.—Property situate wholly within boundaries exclusively within the jurisdiction of the legislative power of the United States cannot be taxed by the territory within which it may be situate.
2. INDIANS—RESERVATIONS—PART OF TERRITORY—SUBJECT TO LEGISLATIVE AND JUDICIAL CONTROL—REV. STATS. U. S. (ORGANIC ACT) 1878, SECS. 1839, 1840, CITED AND CONSTRUED.—In absence of treaty or other express exclusion an Indian reservation becomes part of the territory for legislative and judicial control, subject, however, to the power of the general government to make regulations respecting the Indians, etc. Statutes, *supra*, cited and construed.
3. TAXATION—PROPERTY WITHIN INDIAN RESERVATION.—A railroad-track and the right of way, granted by the government with the consent of the Indians, within an Indian reservation, not expressly excluded from territorial jurisdiction, is subject to taxation by the territory.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

H. N. Alexander, for Appellant, The Maricopa and Phoenix Railroad Company.

The Indian reservations are by law excepted from the jurisdiction of all territories, and are not subject to their laws,—in fact, so far as state and territorial laws are concerned, stand in the position of a foreign country, and are only subject to the control of the United States government and the laws of Congress. U. S. Rev. Stats., title 23, ch. 1, secs. 1839-1840.

The Pima and Maricopa Indians have never signified their assent to the President of the United States to be embraced within territorial jurisdiction of this particular territory,—i. e., the territory of Arizona. Therefore the territory has no rights or jurisdiction over property within the boundaries of their reservation.

“So long as the tribal organization of Indian bands continue, and the United States recognizes their national character, they act under the protection of the treaties and laws of Congress, and their property is withdrawn from the operation of state laws.” Meyer’s Fed. Dec., vol. 27, p. 220; *Harkness v. Hyde*, 98 U. S. 47.

In the case here the easement is granted to a particular person—the public or other person have no right in the easement. It is a particular easement for a particular purpose, ending with the purpose, or when Congress sees fit to repeal the act. It then reverts back to the grantors, the Indians or the United States, as the case may be. No tax-lien can exist in such case for the reason that there are no means by which the lien can be foreclosed or sold. A tax-lien cannot be fixed on the lands of the United States or on the lands of the Indians so long as they belong to or have tribal relations.

This court has no jurisdiction to enforce the payment of this tax. This land is part of lands over which the United States has exclusive jurisdiction, the same as dockyards, arsenals, forts, etc., and only district or circuit courts of the United States have jurisdiction, or courts of a territory while sitting with the jurisdiction of such courts, as provided by section 1910 of the Revised Statutes of the United States. No law can reach over the reservations of Indians, except a law of Congress, and in all cases these are the only courts that can have jurisdiction to try cases arising under the laws of the United States. A territorial law cannot reach into or over an Indian reservation; the territories are prohibited from exercising any jurisdiction over them; they are as if they were without the boundaries of the territory. “They shall be excepted out of the boundaries and constitute no part thereof.” 2 Blackwell on Tax Titles, pp. 758-766; *Douglass County Commissioners v. Union Pacific R. R. Co.*, 5 Kan. 615; *Moore v. County Commissioners*, 2 Wyo. 14.

“As long as the United States recognizes the national character of the Indians, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.” *Kansas Indian Cases*, 5 Wall. 755-756-757-760-761; *New York Indians*, 5 Wall. 761; *United States v. Berry*, 2 McCrary, 68-71, 4 Fed. 779; *Burgess v. Territory*, 8 Mont. 57, 19 Pac. 561, 562; *Scott v. United States*, 1 Wyo. 40; *Brown v. Ilges*, 1 Wyo. 202; *United States v. Stahl*, 1 Woolw. 192, 1 Kan. 606, 1 McCahon, 206, Fed. Cas. No. 16,373; *Swope v. Purdy*, 1 Dill. 349, Fed. Cas. No. 13,704; *Ex parte Reynolds*, 5 Dill. 394, Fed. Cas. No. 11,719; *United States v. McBratney*, 104 U. S. 622, 623, 624; *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. Rep. 995.

Clark Churchill, Attorney-General, and Frank Cox, District Attorney, for Appellee.

GOODING, C. J.—The territory of Arizona, appellee, recovered judgment against the Phoenix and Maricopa Railroad Company, appellant, in the court below for taxes on that part of the Phoenix and Maricopa Railroad lying within the boundaries of the Gila River Indian Reservation, in this territory. It is claimed by appellant that the territory has no jurisdiction within the said reservation, or legislative control over, and consequently no power to tax, property situate therein. If the reservation is to be considered as exclusively under the jurisdiction of the United States, the same as places purchased by the United States within the boundaries of states, and with the consent of said states, and for the purpose of forts, arsenals, magazines, dock-yards, etc., as seems to be assumed by appellant, then the contention of appellant would be supported by a great weight of authority, and would prevail in this case, provided the proposition applied to a railroad track, part of which is situate within and part without the boundaries of the reservation. In other words, we conceive it to be the law that property situate wholly within boundaries exclusively within the jurisdiction of the legislative power of the United States cannot be taxed by the territory within which it may be situate. But is the reservation within or outside of the legislative control of this territory?

The Organic Act provides as follows: "Sec. 1839. Nothing in this title shall be construed to impair the rights of personal property [should be 'persons or property'] pertaining to the Indians in any territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any territory now or hereafter organized until such tribe signifies its assent to the president to be embraced within a particular territory. Sec. 1840. Nor shall anything in this title be construed to affect the authority of the United States to make any regulations respecting the Indians of any territory, their lands, property, or rights, by treaty, law, or otherwise, in the same manner as might be made if no temporary government existed, or as hereafter established in any such territory." Section 1839 provides, in short, that where there is a treaty with an Indian tribe, providing that they shall not be included in any territory without their assent expressed to the president, they shall not be included until their assent is given. If there exists a treaty between the government of the United States and the Pima and Maricopa Indians containing such a provision, then their reservation is outside of the political jurisdiction of this territory. If there is no such treaty, and there is no act of Congress excepting their reservation out of the operation of the Organic Act, then it would seem that the reservation becomes a part of the territory for legislative and judicial control. Section 1840 provides that nothing contained in this title shall be construed to affect the authority of the United States to make any regulations respecting the Indians of the territory, their lands, property, or rights, etc. Thus it will be seen that the authority of the United States over the Indians is not to be interfered with by the territory. Of course, so long as it is a territory, the authority of Congress is paramount in and outside of the reservation. But this does not prevent the exercise of the territorial legislative functions in or outside of the reservation. In the absence of treaty or other express exclusion,

the reservation becomes a part of the territory, subject, however, to the power of the general government to make regulations respecting the Indians, etc.

There is nothing to show, nor does the court know judicially or otherwise, that there ever was any treaty between the government and the Indian tribe or tribes on the reservation. The case in 102 U. S. 145, (*Langford v. Monteith*), is directly in point. We make the following quotations: "Langford, the plaintiff in error, who was plaintiff below, brought an action before a justice of the peace in the nature of forcible detainer, to recover of Charles E. Monteith the possession of buildings and grounds occupied by the latter under the agent for the United States for the Nez Perce Indians." Passing the first ground of defense, the opinion says: "Another allegation of the defense is that the property is situated within an Indian reservation, to which the Indian title has never been extinguished, and therefore forms no part of the territory of Idaho. Of course, if this latter allegation be true, neither the justice of the peace before whom the case was tried first, nor the district court to which it afterwards came by appeal, had any jurisdiction over it. The opinion of this court in *Harkness v. Hyde*, 98 U. S. 476, is relied on by the defendant. The principle announced in that case is sound, namely, that when, by an act of Congress organizing a territorial government, lands are excepted out of the jurisdiction of the government thus brought into existence, they constitute no part of such territory, although they are included within its boundaries. Congress, from which the power to exercise the new jurisdiction emanates, has undoubted authority to exclude therefrom any part of the soil of the United States, or of that whereto the Indians have the possessory title, when by our solemn treaties with them a stipulation to that effect had been made." The opinion further says: "This court in *Harkness v. Hyde*, 98 U. S. 476, relying upon an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shoshones, like that with the Shawnees, contains a clause excluding the lands of the tribe from territorial or state jurisdiction. In this case it seems we were laboring under a mistake. Where no such clause, or language equivalent to it, is found in a treaty with

Indians within the exterior limits of Idaho, the lands held by them are a part of the territory, and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction. As there is no such treaty with the Nez Perce tribe, on whose reservation the premises in dispute are situated, and as this is a suit between white men, citizens of the United States, the justice of the peace had jurisdiction of the parties, if the subject-matter was one of which he could take cognizance." The title to real estate having been raised, it was held that he had not jurisdiction of the subject-matter. This is a decision of the supreme court of the United States to the effect that, in the absence of treaty stipulation, a justice of the peace would have jurisdiction over persons and property on a reservation. The Idaho act was substantially, and almost literally, the same as the Organic Act of this territory in that particular. In *United States v. McBratney*, 104 U. S. 621, it is held that the circuit court of the United States for the district of Colorado had no jurisdiction to try a white man for the murder of a white man on the Ute reservation, in the state of Colorado. There a treaty existed between the United States and the Ute Indians, and among other provisions there was the provision "that a certain district of country therein described should be set apart for the absolute and undisputed use and occupation of the Indians therein named, . . . and that no persons except those therein authorized so to do, and except such officers, agents, and employees of the government as might be authorized to enter upon Indian reservations in discharge of the duties enjoined by law, should ever be permitted to pass over, settle upon, or reside in the territory so described, except as otherwise provided in the treaty." The act admitting Colorado into the Union as a state provided for its admission upon an equal footing with the original states in all respects whatsoever. It was held that this language, notwithstanding the treaty, subjecting the reservation to the state jurisdiction, transferred the jurisdiction to try the defendant for murder within the reservation to the state court, the reservation not being expressly excepted out of the state jurisdiction. In *United States v. Ward*, 1 Woolw. 17, 1 Kan. 601, McCahon, 199, Fed. Cas. No. 16,639, the circuit

court held that the state courts had no jurisdiction in the lands of the Shawnees. But there was a treaty that their lands should never be brought within the bounds of any state or territory, or subject to the laws thereof.

The appellant is evidently misled by failing to note the distinction between reservations with treaties providing against their being included in territorial and state jurisdictions and reservations having no such treaty stipulation. But, even if there had been such treaty stipulation, a subsequent act of Congress in conflict with it would prevail over it. *Cherokee Tobacco*, 11 Wall. 621, says: "A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." But appellant cites a number of cases holding the authority of the United States to be exclusive in certain places and districts, and denying the authority of state or territory therein. These cases are, however, a class unto themselves, and come under a provision of the constitution of the United States. The provision is as follows: "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States, and exercise like authority over all such places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." The origin and effect of this provision is somewhat curious and interesting. The origin and scope of the provision is to be found in *Railroad Co. v. Lowe*, 114 U. S. 529, 5 Sup. Ct. Rep. 995. It is there said: "The necessity of the supreme legislative authority over the seat of government was forcibly impressed upon the members of the constitutional convention by occurrences which took place near the close of the revolutionary war. At that time, while Congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the continental army." In giving an account of this proceeding, Mr. Rawle, in his treatise on the constitution, says of the action of Congress: "It applied to the executive authority of Pennsylvania for defense, but, under the ill-conceived constitution of the state at that time, the executive power was

vested in a council consisting of thirteen members, and they possessed or exhibited so little energy and such apparent intimidation that the Congress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it. It remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, it adjourned to Annapolis. The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive Congress, suggested the remedial provisions now under consideration."

The effect and scope of this constitutional provision is illustrated in a number of cases, extracts from several of which are set out in 114 U. S. 528, 5 Sup. Ct. Rep. 997, which case is cited and relied upon by appellant. We will notice a few of these cases, and it will be readily seen that they are very different from the case under consideration. In *Commonwealth v. Clary*, 8 Mass. 72, "the supreme court of Massachusetts held that the courts of the commonwealth could not take cognizance of offenses committed upon lands in the town of Springfield purchased with the consent of the commonwealth by the United States, for the purpose of erecting arsenals upon them. That was the case of a prosecution against the defendant for selling spirituous liquors on the lands without a license, contrary to a statute of the state, but the court held that the law had no operation within the lands mentioned. 'The territory,' it says, 'on which the offense charged is agreed to have been committed is the territory of the United States, over which the Congress have the exclusive power of legislation.' " In *Mitchell v. Tibbetts*, 17 Pick. 298, it was held "that a vessel employed in transporting stone from Maine to the navy-yard in Charleston, Mass., a place purchased by the United States with the consent of the state, was not employed in transporting stone within the commonwealth, and therefore committed no offense in disregarding the statute making certain requirements of vessels thus employed." The court said: "To bring a vessel within the description of the statute, she must be employed in landing stone at, or taking stone from, some place in the commonwealth, and that the law of Massachusetts did not extend to and operate within the territory ceded; adopting the principle of its previous decision in



8 Mass." "In *Sinks v. Rees*, 19 Ohio St. 306, 2 Am. Rep. 397, the question came before the supreme court of Ohio as to the effect of a proviso in an act of that state ceding to the United States its jurisdiction over land within her limits for the purposes of a national asylum for disabled volunteer soldiers, which was that nothing in the act should be considered to prevent the officers, employees, and inmates of the asylum who were qualified voters of the state from exercising the right of suffrage at all township, county, and state elections in the township in which the national asylum should be located; and it was held that upon the purchase of the territory by the United States, with the consent of the legislature of the state, the general government became invested with exclusive jurisdiction over it and its appurtenances, in all cases whatsoever, and that the inmates of said asylum resident within the territory being within such exclusive jurisdiction, were not residents of the state so as to entitle them to vote, within the meaning of the constitution which conferred elective franchise upon residents alone."

But these cases are clearly distinguishable from this case. They come within the provision of the constitution conferring exclusive jurisdiction "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." The reason and purpose of the exclusive jurisdiction in such places does not exist on Indian reservations. Story, in his Commentaries on the Constitution, says: "If there has been no cession by the state of the place, although it has been constantly occupied and used, under purchase or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect;" and in support of his statement refers to *People v. Godfrey*, 17 Johns. 225. In that case the court says: "If the United States had the right of exclusive legislation over the fortress of Niagara, they would have also exclusive jurisdiction. But we are of opinion that the right of exclusive legislation within the territorial limits of any state can be acquired by the United States only in the mode pointed out in the constitution,—by purchase by consent of the legislature of the state in which the same shall be,—for

the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. The essence of that provision is that the state shall freely cede the particular place to the United States for one of the specific and enumerated objects." " . . . Where, therefore, lands are acquired in any other way by the United States within the limits of the state than by purchase with her consent, they will hold the lands subject to this qualification; that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed." Appellant contends that the owner of the right of way is the Indians, says so in express terms, and says: "You can't tax it, and no lien can exist on such land." The right of way is distinct from the ownership of the soil. The government has granted the right of way, and the Indians have consented to it. That they have no title to the soil, but a mere occupancy, is well settled. In *Johnson v. McIntosh*, 8 Wheat. 574, it is decided that the title to the soil is in the sovereign, though the land may be in the occupancy of the Indian tribes; that the right of the Indians consists in the right of occupancy, and does not interfere with the transfer of the soil by the sovereign or its grantees. This conclusion is reached after a careful and exhaustive review of the whole subject, in a case where the grantee of the Indian title held by a perfect title, if the Indians could acquire and convey a good title to the soil. But it is argued that the land belongs to the Indians upon and over which the track and improvements exist, and cannot be sold for taxes. That the rights of the Indians, whatever they may be, cannot be sold for taxes, is quite clear. The proceeding is not to sell anything not belonging to appellant. The track of the railroad, and its right of way, is charged with the taxes assessed against it, and only the property upon which the charge exists is liable to sale, and the title to no other property would pass thereby. That the railroad track and right of way may be sold for taxes is, we think, too obvious to require argument or citation of authority. That part of it within the reservation may, in our opinion, be fairly considered as subject

to taxation by reason of the grant of the government and the consent of the Indians, and as being a part of a great public highway for railroad purposes, independent of the question of general jurisdiction, above discussed and decided. The item of interest from May 6, 1889, to February 6, 1890, amounting to \$106.20, being interest on taxes, is disallowed. There is no other error, and judgment will be entered for the proper amount.

Kibbey, J., and Sloan, J., concur.

# MEMORANDUM DECISIONS.

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[Civil No. 294.]

JOHN HILL et al., Appellees, v. H. C. HERRICK et al.,  
Appellants.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. William H. Barnes, Judge. Dismissed.

George G. Berry, for Appellants.

Goodrich & Smith, for Appellees.

PER CURIAM.—Upon motion: for the reasons stated in *Reilly v. Crowley*, ante, p. 286, 29 Pac. 14, and upon the authority of that case, this appeal is dismissed, and there will be judgment accordingly. (Filed January 24, 1891.)

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[Civil No. 263.]

THE UNITED STATES OF AMERICA, Appellee, v.  
FORDYCE ROPER, and THE MOUNTAIN MAID  
MINING COMPANY, Appellants.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. Dismissed.

George G. Berry, for Appellants.

H. R. Jeffords, United States District Attorney, Goodrich & Smith, and James Reilly, for the United States.

PER CURIAM.—Upon the authority of *Reilly v. Crowley*, ante, p. 286, 29 Pac. 14, (decided at this term) for like reasons, and upon motion of the appellee, this appeal is dismissed and there will be judgment accordingly. (Filed January 24, 1891.)

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[Civil No. 295.]

HENRY T. BALDRIDGE, Appellant, v. JAMES REILLY,  
Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. William H. Barnes, Judge. Dismissed.

George G. Berry, for Appellant.

James Reilly, *in persona*.

PER CURIAM.—Upon the authority of *Reilly v. Crowley*, ante, p. 286, 29 Pac. 14, (decided at this term) and upon motion by appellee, and for similar reasons, this appeal is dismissed, and there will be judgment accordingly. (Filed January 24, 1891.)

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[Criminal No. 70.]

Ex Parte: In the Matter of GEORGE W. YOUNG, Petitioner.

APPLICATION for a writ of habeas corpus.

Harris Baldwin, for Petitioner.

Attorney-General, for Territory.

February 2, 1891. Writ granted.

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[Civil No. 324.]

WANG HOW et al., Appellants, v. WILLIAM DEE, Ap-  
pellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

George G. Berry, for Appellants.

Herring & Herring, for Appellee.

February 3, 1891. Affirmed.

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[Criminal No. 63.]

**TERRITORY OF ARIZONA**, Respondent, v. **JOSEPH H. YOUNG**, Appellant.

**APPEAL** from the District Court of the Third Judicial District in and for the County of Yavapai.

Wilson & Norris, and Herndon & Hawkins, for Appellant.

Attorney-General, and H. D. Ross, District Attorney, for Respondent.

February 14, 1891. Reversed.

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[Civil No. 305.]

**TERRITORY OF ARIZONA**, Plaintiff and Appellant, v. **THE PERSONS, REAL ESTATE, LAND, AND PROPERTY** Described in the Delinquent List of the County of Pima for the Year 1889, Appellees.

**APPEAL** from the District Court of the First Judicial District in and for the County of Pima.

Clark Churchill, Attorney-General, B. H. Hereford, District Attorney, and Barnes & Martin, for Appellant.

H. W. Maxwell, Maxwell & Satterwhite, C. W. Wright, W. H. Lovell, Haynes & Heney, Jeffords & Franklin, J. A. Zabriske, and F. J. Heney, for Appellees.

February 14, 1891. Affirmed.



**REPORTS OF CASES**  
**DETERMINED IN**  
**THE SUPREME COURT**  
**OF THE**  
**TERRITORY OF ARIZONA**  
**DURING THE YEAR 1892.**

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[Civil No. 311. Filed January 16, 1892.]

[28 Pac. 1134.]

**PRESCOTT AND ARIZONA CENTRAL RAILWAY COMPANY, Plaintiff and Appellant, v. SAMUEL C. REES, and SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, Defendants and Appellees.**

1. **REAL PROPERTY—BUILDING HOUSE UPON LAND OF THIRD PARTY WITHOUT AGREEMENT.**—A house built by one person upon the land of another, without any authority or agreement in respect thereto, becomes a part of the realty, and the property vests in the owner of the soil.
2. **DAMAGES—NEGLIGENCE—DEFENSE—WANT OF INTEREST IN PROPERTY—EVIDENCE.**—In an action for damages for the negligent destruction of a house by fire, where the defense is that the plaintiff has no title to the property, evidence that plaintiff had built the house upon land belonging to a third party, without any agreement or authority so to do, is proper as tending to show that plaintiff had no property interest in the house for which he could recover.
3. **NEGLIGENCE—COMPARATIVE—INSTRUCTIONS.**—An instruction that, if both parties were guilty of negligence in the premises, then the negligence of the one is to be balanced against the other, and the jury is to find for the party least guilty in this respect, is error.

**APPEAL** from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Reversed.

The facts are stated in the opinion.



E. M. Sanford, for Appellant.

Herndon & Hawkins, and Baldwin & Johnson, for Appellees.

SLOAN, J.—This action was brought by Samuel C. Rees and the Springfield Fire and Marine Insurance Company, of Springfield, Massachusetts, against the Prescott and Arizona Central Railway Company, to recover damages for the destruction of a certain house, with its contents, situated near the track of said railway company, and alleged to have been set on fire through the negligence of said railway company, in that its employees negligently permitted cinders and sparks to escape from one of its engines and ignite said house, and thereby destroy it, with its said contents. The said Rees based his right of recovery upon his ownership of the property destroyed; and the said insurance company, by virtue of its right to be subrogated to the right of said Rees in any amount Rees might recover in the action, to the extent of the amount of a certain policy of insurance held by said Rees in said insurance company, and paid to said Rees after the destruction of said property as aforesaid. The case was tried in the court below by a jury, and a verdict found for plaintiffs, (appellees herein). From the order overruling a motion for a new trial, defendants appeal.

One of the issues raised by the pleadings was the ownership of the house. The answer denied that Rees was the true owner, and set up that Rees had, without any authority or license therefor, built the house upon land owned by the Atlantic and Pacific Railway Company; said company becoming thereby the owner of the house. At the trial appellant sought to introduce in evidence the depositions of J. A. Williamson, land commissioner of said Atlantic and Pacific Railway Company, and of J. W. Donnelly, a clerk in the land department of said company, in substance to the effect that the land upon which the house in question had been built was owned by said Atlantic and Pacific Railway Company, being a part of its grant of lands obtained by act of Congress dated July 27, 1868, and that said house had been erected by said Rees upon said land without license or authority therefor from said railway company. This evidence, as well as the testimony of

E. Burgess, register of the United States land-office at Prescott, offered to prove that the land upon which the house stood was within the limits of said grant of lands, was excluded by the trial court upon the general objection being made that it was immaterial and irrelevant. If Rees had no property interest in the house which had been destroyed, then it follows that he could not recover against the appellant for its destruction, as he was not then the real party in interest. Neither could the insurance company recover for the amount paid by it to Rees, as it could only be subrogated to the right of Rees to recover. Would the evidence which was excluded have tended to show that Rees had no property interest in the house? The answer to this must be in the affirmative. The law is settled that a house built by one person upon the land of another, without any authority or agreement in respect thereto, becomes a part of the realty, and the property in the building vests in the owner of the soil. *Cooper v. Adams*, 6 Cush. 87; *Washburn v. Sproat*, 16 Mass. 449; *West v. Stewart*, 7 Pa. St. 122. Evidence, therefore, that Rees had built the house in question upon the land, the title to which was at the time in the Atlantic and Pacific Railway Company, without any agreement or authority from said company, was proper evidence, as tending directly to show that Rees had no property interest in the house for which he could recover, and should have gone to the jury. Its exclusion was therefore error.

Other questions presented by the bill of exceptions, relative to the introduction or exclusion of evidence by the trial court, we pass over, inasmuch as we have, in our judgment, disposed of the most important question, and have found therein error sufficient to reverse the judgment of the court below.

As to the instructions given by the court, we deem it unnecessary to say more than that they present an entirely new doctrine of comparative negligence, by charging, in effect, that if both parties to the suit were guilty of negligence in the premises, then the negligence of the one party was to be balanced as against the negligence of the other, and the jury were directed to find for the party least guilty in this respect; and also to express our disapproval of such or any doctrine of

comparative negligence, and our adherence to the well-settled doctrine of contributory negligence as applied to this class of cases. Judgment reversed and new trial granted.

Gooding, C. J., and Kibbey, J., concur.

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[Civil No. 317. Filed January 16, 1892.]

[28 Pac. 880.]

JOHN BIANCONI, Plaintiff and Appellant, v. PARLEY SMITH, Defendant and Appellee.

1. FRAUD—FALSE REPRESENTATIONS AS TO TITLE—PLEADING—FAILURE TO STATE CAUSE OF ACTION.—Where it appears from the complaint that the fraud alleged to have been practiced upon the vendee related solely to the title of the property sold to him, and there is no allegation that the false representation made by the vendor was to any matter peculiarly within his knowledge, and that the vendee has been guilty of gross carelessness in failing to investigate the title and right of possession, and in failing to demand a warranty deed a demurrer to the complaint is properly sustained.
2. SAME—REAL PROPERTY—SALES—FRAUDULENT REPRESENTATION—WHEN ACTIONABLE.—A vendee may maintain an action for damages against his vendor, upon a sale of real property, upon the ground of false and fraudulent representations, when they relate to some matter collateral to the title and right of possession, or relate to some matter connected with the title peculiarly within the knowledge of the vendor, and not otherwise.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Henry C. Gooding, Judge. Affirmed.

The facts are stated in the opinion.

Baldwin & Johnston, for Appellant.

“That the purchaser of real estate may maintain an action to recover damages of his grantor, even when he takes a quitclaim or other deed without covenants upon such purchase, when he has been induced to make the purchase by means

of fraudulent representations made by the grantor for the purpose of inducing him to purchase, and when the purchaser relies upon such fraudulent representations, is well settled by authorities. It is not the character or kind of property sold and purchased which gives the purchaser a right of action against the vendor for practicing a fraud upon the vendee in effecting a sale. It is the fraud of the vendor, and not the kind of property sold, which is the foundation of the action. Nor does the fact that the grantor refused to give a deed with covenants relieve him from his liability for fraud." *Tyner v. Cotter*, 67 Wis. 488; *Haight v. Hoyt*, 19 N. Y. 465; *Whitney v. Allaire*, 1 N. Y. 308; *McClellan v. Scott*, 24 Wis. 87; *Parks v. Burbank*, 58 Iowa, 707, 12 N. W. 729; *Starkweather v. Benjamin*, 32 Mich. 306; *Lloyd v. Quimby*, 5 Ohio St. 265.

"It is not now claimed that the fact that the mortgage was recorded was of any importance. Where positive representations are made concerning a title for fraudulent purposes, and are relied on, it can hardly be insisted that what would be merely constructive notice in the absence of such declarations, will prevent a person from having the right to rely on statements which, if true, would render a search unnecessary." *Weber v. Weber*, 47 Mich. 571, 11 N. W. 389; *Stewart v. Drake*, 9 N. J. L. 143; *Miller v. Halsey*, 14 N. J. L. 48; *Chapel v. Bull*, 17 Mass. 221; *Norton v. Babcock*, 43 Mass. 510; *Mead v. Bunn*, 32 N. Y. 279; *George v. Taylor*, 55 Tex. 97; *Jackson v. Armstrong*, 50 Mich. 65, 14 N. W. 702.

The appellee contends that inasmuch as the deed was a mere quitclaim, the appellant was not a *bona fide* purchaser; that the quitclaim character of the deed should have warned the appellant into suspicion and vigilance, and that the doctrine of *caveat emptor* applies to the transaction. When the grantor induces the grantee by falsehood to accept a quitclaim deed, there is no rule of law or equity which will relieve him of liability for his fraud. *Ballou v. Lucas*, 59 Iowa, 22, 12 N. W. 745.

Herndon & Hawkins, and John Howard, for Appellee.

The allegation of fraud in the complaint is insufficient. It simply charges a conclusion without setting up any facts or circumstances showing fraud.

The alleged fraud is in regard to a matter of law. The allegation as to fraud relates wholly and entirely to the question of title. Where the alleged fraud relates entirely to the question of title, where one has a title or color of title, it is insufficient to sustain a recovery.

The allegation, showing that plaintiff took only a quitclaim deed, is sufficient to show that he was not an innocent purchaser in the eyes of the law, but assumed to take upon himself all the defects or infirmities of the title.

"False and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages when the representation relates to some matter collateral to the title of the property and the right of possession which follows its acquisition, such as the location, quantity, quality, and condition of the land, the privileges connected with it or the rents and profits derived therefrom. Such representation by the vendor as to his having title to the premises sold, may also be ground of action when he is not in possession and had neither color nor claim of title under any instrument purporting to convey the premises, or any judgment establishing his right to them." *Andrus v. St. Louis Smelting Co.*, 130 U. S. 648, 9 Sup. Ct. Rep. 645.

An action cannot be maintained for alleged false representations pertaining solely to the naked fact of title. *Andrus v. Smelting Co.*, 130 U. S. 648, 9 Sup. Ct. Rep. 645; *Peabody v. Phelps*, 9 Cal. 227.

Statements of opinions do not constitute fraud. *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Kerr on Fraud and Mistake*, p. 83; *Buckner v. Street*, 15 Fed. 368.

The complaint further shows that plaintiff knew that John White was in possession, claiming to own the premises, and under this state of facts took a quitclaim deed from the defendant. Plaintiff was not therefore a *bona fide* purchaser without notice. *Dickerson v. Colgrove*, 100 U. S. 578; *May v. Le Claire*, 11 Wall. 217; *Oliver v. Piatt*, 3 How. 333; *Johnston v. Williams*, 14 Pac. 537.

SLOAN, J.—This is a suit to recover damages for an alleged false and fraudulent representation in regard to the title to certain real property sold and conveyed to appellant

by appellee. The complaint reads as follows: “(1) That the said plaintiff and defendant are residents of said county and territory. (2) That on the nineteenth day of November, 1889, at the town of Prescott, in said county and territory, the said defendant, for and in consideration of the sum of fifteen hundred dollars to him cash in hand paid by this plaintiff, did make, execute, and deliver to this plaintiff a certain deed of conveyance, wherein and whereby, for and in consideration of the said sum paid by this plaintiff as aforesaid, the said defendant did pretend to demise, release, and forever quit-claim to this plaintiff, and to sell and convey to this plaintiff, a certain piece or parcel of land, with the tenements and appurtenances thereto belonging, a copy of which said deed is hereto annexed, marked ‘Exhibit A,’ and made a part of this complaint. (3) That before and at the time of the making, execution, and delivery of said deed by said defendant, and before and at the time of the payment of the said sum of fifteen hundred dollars by this plaintiff to said defendant, as aforesaid, the said defendant did, with the intent to cheat and defraud this plaintiff of said sum of money, falsely and fraudulently represent and say to this plaintiff that he, the said defendant, had then and there an absolutely valid and perfect title to the said land, and could and would by said deed, for said consideration, convey said absolutely valid and perfect title to this plaintiff. (4) That this plaintiff, relying implicitly upon and with perfect confidence in the truth and integrity of said representation, sought and received no further knowledge or information touching the sufficiency of the said defendant’s title to the said land; but, being induced by his belief in the truth of said representation, and relying solely and wholly thereon, he was induced to pay said sum as aforesaid, and to receive said deed as aforesaid. (5) That said defendant at said time had no title whatever to said land, nor had he before or since said time any title whatever thereto, except a certain void tax-deed, of which defendant did not inform plaintiff, and of which plaintiff had no knowledge whatever at said time, all of which defendant well knew. (6) That said representations were and are false and fraudulent. (7) That one John White was at said time, ever since has been, and now is the owner in fee-simple of said

land, and the tenements, hereditaments, and appurtenances thereto belonging, and in the lawful possession thereof, as the said defendant well knew. (8) That on the twenty-fourth day of February, 1890, this plaintiff began an action in said court to try his title to the said land as against, and to recover the possession thereof from, the said John White; but such proceedings were thereupon had therein that on the fifteenth day of March, 1890, by a judgment of said court the said John White was adjudged to be the true and lawful owner of said land, and entitled to the possession thereof, and that the title derived by this plaintiff, as aforesaid, from said defendant, to said land, was utterly void and of no effect. (9) That said action is wholly concluded and terminated. (10) That by reason of the premises this plaintiff has been damaged in the sum of fifteen hundred dollars, and interest thereon at the rate of seven per cent per annum from the nineteenth day of November, 1889, till a recovery of said fifteen hundred dollars. Wherefore plaintiff prays judgment against said defendant for the sum of fifteen hundred dollars, with interest thereon as aforesaid, and for costs." The appellee demurred to this complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and appellant appeals from this ruling.

From the complaint it appears that the fraud, if any, which was practiced upon appellant, related solely to the title of the property sold and conveyed to him by appellee. It is not alleged that the false representation made by appellee was to any matter within his peculiar knowledge or possession. On the contrary, the allegation of the complaint is that such title as appellee had was derived from a tax-deed to the property, and that at the time of the conveyance to appellant one White was in possession of the property, claiming it as his own. It is to be presumed that this tax-deed was of record at the time of purchase, and that any fact or facts which void its effect as a conveyance could have been ascertained by appellant by an inspection of the record of the proceedings which preceded its execution by the proper officer. From anything which appears to the contrary in the complaint, appellant might also have easily ascertained by simple inquiry that

appellee was not in the possession of the property, and thus have been put upon his guard. Common, ordinary business prudence would have suggested some investigation as to the source of appellee's title, and some inquiry as to who was in possession, before purchasing the property; and appellant's neglect of these indicated either gross carelessness or a degree of credulity not usually exhibited by men of ordinary experience. Had some act of deceit or fraudulent concealment been alleged, other than the mere assertion of appellee that he had a good and perfect title to the property, which induced appellant to forego an investigation as to the title and the possession of the property, the case might have presented a different aspect, and its merits be more apparent. Not only was gross carelessness and lack of prudence shown by appellant in failing to make any investigation into appellee's title and his right of possession, but also in his failure to protect himself by a deed containing warranty of title. The facilities for obtaining information relative to this title and right of possession were open to appellant, from anything which appears to the contrary from the complaint; and, besides, he could have demanded and required such a conveyance as would have protected him from a failure of title. Will, then, relief, upon the ground of false and fraudulent representation, be granted a vendee, from the consequences of his folly in trusting implicitly in the naked assertions of his vendor that he has a good title, and in taking without investigation a conveyance without warranty? We think not. To use the language of Chancellor Kent in *Clark v. Baird*, 7 Barb. 66: "The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or careless indifference to the ordinary and accessible means of information." From an examination of the authorities, we deduce the following as the true rule in such cases: A vendee may maintain an action for damages against his vendor, upon a sale of real property, upon the ground of false and fraudulent representations, when they relate to some matter collateral to the title and the right of possession, or relate to some matter connected with the title within the peculiar knowledge of the vendor, and not other-



wise. *Andrus v. Smelting Co.*, 130 U. S. 645, 9 Sup. Ct. Rep. 645; *Peabody v. Phelps*, 9 Cal. 213; 2 Kent's Commentaries, 285, 484. For the reasons stated, the judgment of the court below in sustaining the demurrer and dismissing the action is affirmed.

Kibbey, J., concurring. Gooding, C. J., not sitting.

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[Civil No. 312. Filed January 16, 1892.]

[29 Pac. 9.]

KANSAS CITY MINING AND MILLING COMPANY,  
Plaintiff and Appellant, v. JAMES W. CLAY, De-  
fendant and Appellee.

1. PUBLIC LANDS—PRE-EMPTION—PATENTS—SALINES AND MINES NOT INCLUDED—SEC. 2258, REV. STATS. U. S., CONSTRUED.—Under section 2258, Revised Statutes of the United States, providing that lands, upon which are situated any "known salines or mines," shall not be subject to pre-emption, the land department has no power to convey the legal title to known mines by patent obtained under pre-emption entry.
2. SAME—SAME—SAME—SAME—PATENT NOT CONCLUSIVE AS TO MINES.—Whether or not land contains "known salines or mines" is not a fact which is required to be shown at the time of making a pre-emption entry, and the patent is therefore not conclusive thereon.
3. SAME—SAME—EJECTMENT—COLLATERAL ATTACK ON PATENT—CHARACTER AS CONVEYANCE OF KNOWN MINES.—When one, claiming under a patent issued upon a pre-emption, brings ejectment to recover a mine within the boundaries of the land granted, the defendant may attack the patent collaterally by proof that mines were known to exist at the time of its issuance, and thereby defeat its character as a conveyance of such mines.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Reversed.

The facts are stated in the opinion.

Herndon & Hawkins, Wilson & Norris, and E. M. Sanford,  
for Appellant.

E. Burgess, and Baldwin & Johnston, for Appellee.

SLOAN, J.—James W. Clay, the appellee herein, brought suit against the Kansas City Mining and Milling Company, appellant, for the recovery of land described as the south  $\frac{1}{2}$  of northwest  $\frac{1}{4}$ , of section 26, township 13 north, range 2 west, Gila and Salt River meridian, and for damages for the value of certain ores taken from said land by appellant, and for an injunction to restrain the working of certain mineral-bearing veins or ledges thereon, and taking ores therefrom by appellant. Appellant, answering the complaint, set up these several matters in defense of the action: (1) That, as to so much of said land sued for as is covered by two mining locations known, respectively, as the "Silver King" and "Western Extension of Silver King," appellant pleaded "Not guilty." As to the remainder, he entered a disclaimer. (2) That, as to so much of said land as is contained within the boundaries of said mining location, he alleged that the same was not agricultural land, but was more valuable for its minerals than for other purposes; that at the time plaintiff and his grantors entered the same under the pre-emption laws of the United States, and before patent issued to the same, said land was known to contain valuable minerals, and had in fact been located under the mineral laws of the United States, and opened up, and shown to contain ores of great value. (3) That appellant holds said land covered by said locations by virtue of a compliance with the mining laws of the United States. The case having been tried in the court below by a jury, a verdict for plaintiff (appellee herein) was returned, and judgment entered in accordance therewith. At the trial, appellee, to establish his right to recover, put in evidence certain deeds, by which he deraigned title to the land described in his complaint from one Blackburn, who, in 1879, obtained a patent from the United States to the same, under a pre-emption entry, and also put in evidence this patent. Appellant then offered to prove that at the time of the pre-emption entry by Blackburn, and the issuance of said patent,

there was upon said land a well-defined gold and silver bearing quartz-vein of ore, and that the same was then known to exist, and had been prior thereto located and worked for its minerals. The exclusion of this evidence by the trial court is relied upon by appellant as the principal assignment of error.

The first question suggested by this assignment is, when and under what state of facts may a patent of the United States to land obtained under the pre-emption laws be collaterally impeached in an action at law? The general rule, as laid down by the authorities, as to the conclusiveness of a patent in such a case seems to be that all persons whatsoever, in an action at law, are concluded by the patent upon all matters and things over which the land-officers of the government have jurisdiction, and are authorized to exercise their judicial functions. "The judgment of the land department of the government upon all matters properly determinable by them is conclusive, when brought to notice in a collateral proceeding, and can be assailed only by a direct proceeding for its correction and annulment." *Smelting Co. v. Kemp*, 104 U. S. 647; *Steel v. Smelting Co.*, 106 U. S. 450, 1 Sup. Ct. Rep. 389. In the case last cited, Justice Miller, delivering the opinion of the court, quotes with approval the general doctrine as expressed in *Johnson v. Towsley*, 13 Wall. 72: "That, when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others, and that the action of the land-office in issuing a patent for any of the public land subject to sale, by pre-emption or otherwise, is conclusive of the legal title, must be admitted, under the principle above stated; and in all courts, and in all forms of judicial proceedings, when this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained." This unassailable character of a patent of the United States applies only in so far as the land department has jurisdiction and authority to act. It is well settled, in repeated decisions of the supreme court of the United States, that, if the land department exceeds its jurisdiction in issuing a patent to land

not the subject by it of sale or disposal, this may be shown in an action at law to defeat its operation and annul its character as a conveyance. In *Steel v. Smelting Co.*, cited above, this language is used: "It need hardly be said that we are speaking of a patent issued in a case where the land department had jurisdiction to act; the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorized their sale, or if they had previously been disposed of, or if they had been reserved from sale, the patent would be inoperative to pass the title, and objections to it could be taken on these grounds at any time and in any form of action."

It is readily apparent from these general principles just stated that the difficulty is in applying them to particular cases, and in formulating such a rule as will make clear whether any given state of facts brings the case within the general doctrine as to the conclusiveness of a patent, or brings it within one of the exceptions stated above; and this brings us to the next question suggested by the assignment: Was the patent to Blackburn, obtained under the pre-emption laws, open to attack in this suit by proof that, at the time of its issuance, there were, within the land which it covered, "known mines," valuable for their minerals, and thus to avoid its effect as a conveyance of the legal title of the government to so much of the land as was included within the mining locations claimed by the appellant? The position taken by the counsel for appellant is that the effect of the exemption of "known salines or mines" in the pre-emption act is to wholly reserve such lands from sale, and thus to limit the power of the land department to pass title to the same under the provisions of the pre-emption act. On the other hand, it is contended by the counsel for appellee that the effect of the exemption is simply to require the land department, by proof, in its judicial character, before issuing a patent, to ascertain whether mines are known to exist within the boundaries of the claim, and that the action of the department in issuing a patent is as conclusive upon that point as upon other questions of fact upon which the department is required to pass in issuing a patent. None of the cases cited by appellant are

directly in point upon the questions presented by these opposing views of the law, in that they were either cases of patents issued by the government where the title to the lands was not in the government at the date of issuance, or where the lands had been reserved from sale, and therefore the land department had no jurisdiction over them, or cases involving the construction to be given to the reservation of known mines under town-site acts, and in some instances under placer locations. These cases, however, particularly those in reference to the effect of town-site patents, and also of patents to placer mines, are instructive, in so far as they illustrate and indicate the general policy of the government in reserving valuable mineral lands, known to be such at the date of patent, from the operation of a patent issued in any other method than that specifically provided by Congress for the disposal of its minerals; and we may gather from them, as well as from an examination of the various acts of Congress relative to the disposal of the public lands, to what extent the land department is empowered to act in passing upon the nature and character of land containing minerals, so as to conclude by its action all persons not connected with the original source of title from calling in question, in an action of law, the validity of such patent. Section 2318 of the Revised Statutes of the United States is declaratory of the general policy of the government with respect to her general lands. It reads: "In all cases, lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." This must be taken, in view of the fact that prior to the act of July 4, 1866, no law authorized the sale or disposal of any mineral lands belonging to the United States, and the further fact that subsequent laws incorporated in the Revised Statutes provide expressly how title to such lands may be acquired, as limiting the power and authority of the land department in disposing of the public lands valuable for minerals to some method and under such conditions as may be specifically pointed out by some act of Congress. Nearly all of what are known as the "Public Land Acts" contain reservations of some description from their operation of lands known to contain minerals of value. Thus, in section 2392 of the Revised Statutes, it is provided that, under the pro-

visions of the town-site act, "no title shall be acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." Section 2341 restricts homestead entries to lands upon which "no valuable mines of gold, silver, cinnabar, or copper have been discovered." Section 2333 exempts from the operation of the patent obtained under the provisions of law relating to placer locations all veins or lodes containing valuable mineral known to exist at the time of the application for the patent, while section 2258 provides that lands upon which are situated any "known salines or mines," unless otherwise specifically provided by law, shall not be subject to the rights of pre-emption. So far as the supreme court of the United States has construed these various provisions of the acts of Congress relative to mineral lands, it has, it seems to us, from an examination of the cases, uniformly held them to be a limitation upon the power of the land department, by patent, to pass title of any kind, legal or equitable, to lands reserved from operation of the acts by which title to lands may be acquired by reason of their known mineral character. These cases are principally of two classes,—those known as the "Town-Site" and those known as the "Placer Mine" cases. The first construe the reservation contained in section 2392, and the latter the exemption contained in section 2333 of the Revised Statutes. So far as we have been able to find, the effect in limiting the power of the land department of the exemption from the operation of the homestead law, found in section 2341, and also the exemption from the operation of the pre-emption law, found in section 2258 of the Revised Statutes, now under consideration, has never been judicially determined by that court. An examination, however, of these Town-Site and Placer Mine Cases leads to the conclusion that the same rules would apply in the construction of the latter section as in the former.

The leading case under the town-site act is that of *Deffebach v. Hawke*, 115 U. S. 404, 6 Sup. Ct. Rep. 95. In this case the plaintiff, who had obtained patent to certain mineral lands in Dakota under a placer mining location, brought suit in ejectment against the defendant, who claimed a right of possession to part of the premises included in the patent by

virtue of an entry under the town-site act made prior to the placer location and patent. The court held that although an entry under the town-site act might be made of lands containing valuable minerals, discovered to be such after the entry for town-site purposes, yet, such entry, and the patent obtained thereunder, would, under the general policy of the law with reference to mineral lands, and particularly under section 2392 of the Revised Statutes, exempting from the provisions of the act any mine of gold, silver, cinnabar, or copper, confer no title to any lands contained within its limits, known at the time to be valuable for their minerals or discovered to be such before their occupation or improvement for residence or business under the town-site title. In a more recent case—that of *Davis's Adm. v. Weibbold*, reported in 139 U. S. 508, 11 Sup. Ct. Rep. 628, which was an action brought by Weibbold, plaintiff, to recover certain land situate in Silver Bow County, Montana, embraced in a patent to a lode-mining claim issued in 1880, against the defendant, Davis, who held possession and claimed title to the same under a subsequent patent to the town-site of Butte City, issued in 1877 to the probate judge as trustee for the use of the occupants of said town-site—the question was presented whether proof was admissible to show that at the time said patent issued to said town-site the premises embraced in the lode claim were not known to contain valuable minerals, and thus to establish that the town-site patent carried complete title to the land embraced therein, notwithstanding it was subsequently found to contain minerals of value. In passing upon this question, the court, while admitting that the language of the declaration in the town-site act, “that no title shall be acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws,” was quite broad enough to constitute a reservation to the United States in the lands sold of mines known at date of patent to exist therein, as well as those subsequently discovered, yet reiterate and adhere to the doctrine expressed in *Deffebach v. Hawke*, that the reservation must be read “merely to prohibit the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar, and copper, which are known to exist on the issue of the town-

site, and to mining claims and mining possessions in respect to which such proceedings have been taken under the law or the custom of miners as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried in the depths of the earth." As a necessary sequence to the view thus expressed, as to how far the reservation of mineral lands from the act should be held to extend, the court held that whenever the presumption arises from the issuance of a patent to a mine embraced in a prior town-site patent that the mine was known to exist, and the land known to be valuable for its minerals at the date of the patent, proof rebutting this presumption is admissible, thus recognizing that an issue might arise in an action at law as to whether a patent to a town-site carries with it any title to mineral lands embraced within its boundaries. A very instructive case, and the leading one upon the subject of exemption under "placer mining" locations and entry made by section 2333, is that of *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601. In this case plaintiff sought to recover possession of a certain lode or vein containing minerals in the possession of the defendant. Plaintiff claimed title as the patentee of certain placer patents covering the said mineral-bearing vein in possession of the defendant, who relied wholly upon the weakness of plaintiff's title, by reason of the fact that said vein or lode was known to exist at the date of the issuance of said patent, and was therefore exempted by act of law from its operation as a conveyance from the government. This position of defendant was sustained by the court, and the doctrine clearly announced that a placer patent conveyed no title to lodes or veins within its boundaries, known to exist at the date of issuance, but only to such lodes or veins whose existence at the date of patent were unknown, leaving a court of law to determine the existence of the fact whether or not such lodes or veins were known to exist at the date of such patent. It was argued, however, that the latter and other similar cases are not to be taken as authorities in this case, inasmuch as patents to placer claims specifically and in terms exempt all lodes, veins, or other mineral-bearing quartz which are claimed or known to exist at the date of the patent from its operation as



a conveyance. The court, however, in the last-mentioned case, say that this exception in the granting clause of a placer patent only gives expression to what was evidently the intention of Congress in the statutes, and, in effect, whether such exception appeared in the patent or not, such veins, lodes, or mineral-bearing quartz would be excluded, as much as if described in clear terms. In what particular the law with respect to patents to placer claims differs in this regard from patents of pre-emption claims, it seems to us, is not apparent. In the former case the statute declares that "where a vein or lode, such as is described in section 2320 was known to exist within the boundaries of a placer claim an application for a patent to such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of the vein or lode in the placer claim is not known, a patent for the placer claim shall convey all valuable minerals and other deposits within the boundaries thereof." In the latter case, "known salines or mines" are declared by the statute to be exempt from the operation of the pre-emption law. It is evident, it seems to us, from these various provisions of the statute, that Congress intended equally to take it out of the power of the land department in the one case to convey by patent even the legal title to veins or lodes known to exist within the boundaries of a placer claim, and in the other known mines by patent obtained under a pre-emption entry.

An examination of the pre-emption act will show the weakness of the contention that the existence or non-existence of known mines upon the land claimed under a pre-emption entry is a fact for the determination of the land-officers at date of final proof, and that their action in issuing patent is conclusive upon that fact. It will be observed that the pre-emption law, whatever may be the practice of the land department in requiring *ex parte* proof of the non-mineral character of the land, does not make it the duty of the land-officers to take proof at the time of filing the declaratory statement, or at the time of final proof and payment, to ascertain whether "known salines or mines" exist within the boundaries of the claim, as

a prerequisite to his right to obtain patent to the same. It does require proof of the claimant's qualifications to obtain land under the act, of his good faith, and also of the settlement and improvement of the land in question. Such, in substance, are the facts required to be shown by the claimant, and as to these the patent is conclusive in an action at law. Upon these facts depended the personal right of the claimant to require a conveyance from the government upon payment of the amount required, provided the law gave him the right to purchase the particular land included in his application. Upon the existence of the fact whether or not the land contained "known salines or mines," by section 2258, depended the right to purchase that particular piece of land, and the right of the land department to sell it. If it was the policy of the law to leave the determination of both these questions to the land department, from the *ex parte* proof of the claimant, it seems strange that nothing is said in the act as to proof of the latter. We cannot, therefore, assent to this view that it is a fact to be shown at the time of the application, that the land does or does not contain known mines, and that the patent is conclusive upon that point.

We conclude, therefore, that the exemption of "known salines or mines," under the pre-emption law, should be construed as preventing the obtaining, under the act, of any title to such mines as are known to exist at the date of application for patent, and hence as constituting one of the exceptions to the conclusiveness of a patent to the public domain mentioned by the court in *Smelting Co. v. Kemp*, for the want of authority or power in the land department to pass by pre-emption patent the title of the government to such mines. The title remaining in the United States, it follows that, when such patent has issued, it may be collaterally attacked in an action at law by proof that such mines were known to exist at the time of issuance of patent, and its character as a conveyance of such mines be defeated.

For the reasons stated, we hold, therefore, that the court erred in not permitting the defendant to prove that at the time of the application for patent by Blackburn, under his pre-emption entry, there was upon the land described in the patent a known mine of gold and silver-bearing quartz, and

that the same had been prior thereto located and worked for its minerals. Judgment is accordingly reversed, and the case remanded for a new trial.

Gooding, C. J., and Kibbey, J., concur.

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[Civil No. 293. Filed January 16, 1892.]

[29 Pac. 386, *sub nom.* Shute, Sheriff, et al. v. Keyser.]

**WILLIAM KEYSER, Plaintiff and Appellee, v. GEORGE E. SHUTE, Sheriff, et al., Defendants and Appellants.**

1. **APPEAL AND ERROR—APPEALS—HOW PERFECTED—REV. STATS. ARIZ. 1887, PAR. 849, CITED—ADDITIONAL TRANSCRIPT.**—An appeal is perfected by giving notice of appeal in open court and by filing with the clerk of the court below an appeal bond or an affidavit in lieu thereof, within twenty days after the expiration of the term at which the judgment appealed from is rendered. Statute, *supra*. Where notice of appeal was duly given, but the original transcript failed to show the filing of an appeal bond, after motion to dismiss for failure to file such bond, appellants may file an additional and corrected transcript showing the proper bond was duly filed. The jurisdiction of this court vests upon the performance of the conditions required by statute, and the motion to dismiss will be denied.
2. **SAME—ASSIGNMENTS OF ERROR—FUNDAMENTAL ERROR—REV. STATS. ARIZ. 1887, PAR. 937, CITED.**—The rule that in the absence of an assignment of errors the judgment will be affirmed or the appeal dismissed applies only when the error is not fundamental. Where the error appears on the face of the record as a demurrer to the complaint, and goes to the right of the plaintiff to maintain the action, it must be considered though it be not assigned. Statute, *supra*, cited. *Gila E. I. Co. v. Wolfley*, ante, p. 176, 24 Pac. 257; *Putnam v. Putnam*, ante, p. 182, 24 Pac. 320, limited; *United States v. Tidball*, post, p. 384, 29 Pac. 385, cited.
3. **INJUNCTIONS—PRACTICE—APPEALS—GOVERNED BY CODE CIVIL PROCEDURE—REV. STATS. ARIZ. 1887, PAR. 2144, CONSTRUED.**—Paragraph 2144, *supra*, permits the supplying of any matter of practice or procedure in injunction suits, provisions for which have not been made by the code, and that in supplying such omissions the rules generally prevalent in courts of equity shall govern. The right to

appeal in injunction cases is given and regulated by the Code of Civil Procedure.

4. CORPORATIONS—FOREIGN—POWERS—PRESUMPTION.—In absence of proof to the contrary, it will be presumed that a foreign corporation has the same powers to sue and be sued, to appear and defend when sued, or suffer default and judgment thereby, as a domestic private corporation.
5. SAME—JUDGMENTS—POWER TO CONFESS—INCIDENT TO THE RIGHT TO SUE AND BE SUED.—A private corporation has the right to confess judgment.
6. SAME—INSOLVENT—PREFERENCES—CONFESSION OF JUDGMENT—WHO MAY COMPLAIN—VOIDABLE—COLLATERAL ATTACK.—Even though it be true that an insolvent corporation may not give a preference by confession of judgment or otherwise, only existing creditors can complain. Such preferential judgment is not void but voidable, and is not subject to collateral attack.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. William W. Porter, Judge. Affirmed.

The facts are stated in the opinion.

George R. Berry, for Appellants.

Anderson, Fitzgerald & Anderson, for Appellee.

KIBBEY, J.—This was a suit by the appellee against the appellant George E. Shute, sheriff of Gila County, and the other appellants, judgment-creditors of the Old Dominion Copper Mining Company, to enjoin them from a threatened sale of certain property under an execution against that company, being property alleged formerly to have been property of the company, but of which the appellee now alleges himself to be the owner. A motion has been made in this court to dismiss the appeal because (1) of a defect in the certificate of the clerk of the district court appended to the transcript, in that it omits to state that the transcript is a transcript of all the proceedings had in the cause in the court below: (2) the transcript does not contain a copy of the appeal-bond or affidavit in lieu thereof; (3) the transcript does not contain a copy from the fee-book of the costs accrued; and (4) the tran-

script does not show that the assignment of errors was ever filed in said cause.

An appeal to this court from the judgment of a district court is perfected by giving notice of appeal therefrom in open court, and by filing with the clerk of the district court an appeal-bond or affidavit in lieu thereof within twenty days after the expiration of the term at which the judgment appealed from was rendered. Rev. Stats. Ariz. 1887, sec. 849.

It appears from the transcript originally filed here, omitting notice of some irregularities relative thereto, which we deem to have been waived by the stipulation of the parties, that notice of appeal was given. The original transcript omits, however, any mention of the filing of an appeal-bond, or affidavit in lieu thereof; but there appears, in the certificate of the clerk of the district court whence this appeal comes, the statement that an undertaking on appeal, in due form and time, had been filed, and was on file in his office with the papers in the cause. Appellants, after the motion to dismiss had been made, offered to file an additional transcript, (made by the clerk of the district court,) which was duly certified, from which it appeared that an appeal-bond had been filed within the time and in the form prescribed. The jurisdiction of this court having vested upon the concurrence of the two acts of giving notice of appeal and the filing of a bond as required, the appellants were allowed to file the additional transcript. The additional transcript also includes the statement of costs which had been omitted from the original transcript. Ordinarily, in the absence of an assignment of errors, this court is justified in either affirming the judgment below or dismissing the appeal. *Gila R. I. Co. v. Wolfley*, ante, p. 176, 24 Pac. 257; *Putnam v. Putnam*, ante, p. 182, 24 Pac. 320; *United States v. Tidball*, post, p. 384, 29 Pac. 385, (at this term). But this is so only when the error is not fundamental. If the error be one appearing on the face of the record, and goes directly to the foundation of the right of the plaintiff to maintain his action at all, then we cannot avoid considering it, even though it be not assigned. See section 937, Rev. Stats. Ariz. 1887. *United States v. Tidball*, (at this term). To this extent we limit the rule laid down in *Putnam v. Putnam*. The motion to dismiss the appeal is overruled.

There was a judgment in the court below,—a judgment perpetually enjoining the appellants from selling the property in dispute under the executions described in the complaint. There is in the record neither a statement of facts, a bill of exceptions, nor a motion for a new trial. There are several alleged errors argued by appellants, all of them relating to rulings of the court below made during the progress of the trial of the case. It is objected here that we cannot consider these errors, because they do not properly appear of record. Appellants very strenuously urge, however, that our code does not require, in cases where the relief sought is merely injunctive, that errors occurring at the trial shall be incorporated into the record in the manner prescribed in the Code of Civil Procedure, and cite section 2144 of the Revised Statutes of 1887. Section 2144 is: "The principles, practice, and procedure governing courts of equity shall govern proceedings in injunctions, when the same are not in conflict with the provisions of this act or other law." Upon this appellants argue that the practice and procedure, even upon appeal and in the manner of perfecting it, are "governed by the rules of practice of the federal courts of the United States and the high court of chancery of England." We cannot concur in that view. Section 2144 simply permits the supplying of any matter of practice or procedure in injunction suits, provisions for which have not been made by our code, and that in supplying such omissions we shall be governed by the principles, practice, and procedure generally prevalent in courts of equity in such cases. Our code has prescribed the practice and procedure in all cases of appeal from the district courts to this court. It was not intended to prescribe a different practice upon appeal in injunction cases. Title 35, "Injunctions," of which section 2144 is a part, is a separate act within itself, distinct from the General Civil Code of Procedure. In it there is no provision at all for appeal. The right to appeal in injunction cases is given by the provisions of the Civil Code of Procedure, and, of course, we think, governed and regulated by it. If not, we are at a loss to know to what courts of equity we should look for our rules of practice in matters of appeal in injunction cases. We see no reason for preferring the practice prevailing in the federal courts to

those of any of the several states where there are courts of chancery. Besides, the federal courts are not "courts of equity," any more than are the courts of our territory. There being no statement of facts and no bill of exceptions, the only record presented for our consideration is the judgment-roll.

The defendants demurred to the complaint. The demurrer was overruled. If this be error, it is one fundamental and apparent upon the record, and need not here be assigned. As a matter of fact, it is not assigned. It is alleged in the complaint that the appellant Shute is the sheriff of Gila County; that the other appellants are residents of New York and are copartners; that the Old Dominion Copper Mining Company is a corporation organized under the laws of the state of New York, and has heretofore been carrying on business in Arizona; that on and prior to the 23d of February, 1884, the Old Dominion Copper Mining Company was the owner of certain mining property, a description of which is set out in the complaint; that on that day a judgment was duly entered in the district court of the second judicial district of the territory of Arizona, in and for Gila County, against the said Old Dominion Copper Mining Company, in favor of George Pope and others (among whom was the plaintiff in this case) for the sum of \$277,378.27, and interest from January 31, 1884, and ten dollars costs; that said judgment was by confession; that on the twenty-sixth day of January, 1886, an execution upon said judgment was issued to and placed in the hands of the sheriff of Gila County, commanding him to cause to be made the moneys in said writ specified off of the lands, hereditaments, and real property (if sufficient personal property could not be found) belonging to said judgment debtor, the Old Dominion Copper Mining Company, on the twenty-third day of February, 1884, or at any time thereafter; that, there not being sufficient personal property of said debtor, the execution was levied on all the right, title, and interest of said judgment debtor in and to the property described in the complaint, as the property of the judgment debtor; and that the same was duly sold under and by virtue of said execution and levy by said sheriff (together with other real estate of said debtor) to plaintiff on the twentieth day of February, 1886, for one hundred and thirty thousand dollars lawful money of

the United States, and certificate of sale was duly issued therefor; that after the time for redemption had expired, to wit, on the 21st of August, 1886, a deed was duly executed by said sheriff to plaintiff for the real estate so sold by him to the plaintiff; that, by virtue of said levy, sale, and deed, plaintiff became vested with all the right, title, and interest in said real estate, and on the 21st of August, 1886, entered into and has since remained in possession thereof, claiming the fee-simple title thereto under said levy, sale, and deed; that on the 30th of November, 1887, three judgments were rendered in said district court in and for the county of Cochise, in favor of the appellants, other than Shute, against the Old Dominion Copper Mining Company, for sums aggregating \$23,822.69; that executions were issued on said judgments on the 16th of January, 1888, and have been placed in the hands of the appellant Shute, sheriff of Gila County, and that the said sheriff, not regarding the rights of plaintiff, has levied the same on said property, and has advertised the same for sale on the 6th of March, 1888, and will, unless restrained, so sell the same, etc.

Appellants discuss several questions in their very full and able brief. They claim that a corporation has not the power to confess a judgment, and that they had acquired a prior lien on the property in question by virtue of the levy of certain writs of attachment. The second proposition, because of defects in the record is not properly presented for our consideration. Appellants very earnestly contend that a corporation has no power to confess a valid judgment; that, therefore, the pretended judgment against the Old Dominion Copper Mining Company is void, and plaintiff's title thereunder, and consequently his cause of action in this case must fail. Counsel do not cite us a case wherein the power of a corporation to confess a judgment is denied. We do not know, and are not informed by the record, what were the powers of the Old Dominion Copper Mining Company. It was a corporation organized under the laws of the state of New York, whether by special charter or under general incorporation laws does not appear. That it is a private corporation fairly appears, for it is hardly conceivable that a public corporation, organized under the laws of New York, should be engaged in business in Arizona. It is admitted by the demurrer that it was



engaged in transacting business in Arizona, necessarily, then, entering into contracts. A domestic private corporation has the power to sue, is liable to be sued, and may appear in court and defend when it is sued; may, we suppose, of course suffer default and judgment; and we see no reason, in absence of proof to the contrary, to presume that the same attributes do not attach to a foreign private corporation. There are attributes so universally incident to private corporations in modern times that it would be totally at variance with the probabilities to presume otherwise. Indeed, it is said by the text-writers that it is necessarily implied that a corporation, from the mere fact of its incorporation, may sue and be sued. Field on Corporations, sec. 360; Morawetz on Private Corporations, sec. 356. Incident to the right to sue, and the liability to be sued, we think is unquestionably the right to confess judgment. In no case to which our attention has been called has the power of a corporation to confess judgment been doubted or called in question. In *Stebbins v. Society*, 12 How. Pr. 410, a case cited by appellant, a doubt of such power was not suggested. Black, in his recent work on Judgments, discusses the power of agents of a corporation to confess a judgment, but does not even intimate that to confess a judgment is *ultra vires* of a corporation. Indeed, while he does not in terms assert that power to exist, yet the inference is necessary from his statement that the corporation is bound by a confession of a judgment by its officer upon whom summons might have been served in a contested action. 1 Black on Judgments, sec. 59; and see Freeman on Judgments, sec. 545. Morawetz lays down the broad rule that the managing agents of a corporation have authority to confess judgment whenever they deem it to be to the interest of the corporation. Morawetz on Private Corporations, sec. 430. In *Miller v. Bank*, 2 Or. 291, wherein a judgment by confession against a corporation was under discussion, the question was whether the president had *virtute officii* the power to confess for his principal; that the confession was *ultra vires* the corporation was not even suggested. In *McMurray v. Manufacturing Co.*, 33 Mo. 377, the questions were as to the power, *virtute officii*, of the president of a corporation to confess judgment; the sufficiency of the statutory statement required to accompany

such confession; and the power of the corporation to create a lien by such a judgment, the statute prohibiting it from mortgaging their property or giving any lien thereon. In *Joliet etc. Co. v. Ingall*, 23 Ill. App. 45, a judgment against a corporation by confession was under consideration. The question whether the corporation had the power to confess a judgment was not suggested. The matter considered was the authority of the particular officer who did confess the judgment to do so. And so in *Stokes v. Pottery Co.*, 46 N. J. L. 237; *Thew v. Manufacturing Co.*, 5 S. C. 415; *White v. Crow*, 17 Fed. Rep. 98. And in all these cases there was a direct attack upon the judgment, and not a collateral one, as in this case. We do not entertain a doubt of the general right of a private corporation to confess a judgment.

Appellants further urge that an insolvent corporation cannot give a preference to any of its creditors, either by way of a confession of judgment or otherwise. This question will not avail appellants in this case, and does not require discussion. If it could be inferred from the allegations of the complaint that the Old Dominion Copper Mining Company was insolvent at the time of the confession of the judgment in question, and we do not say that such inference is warranted, yet it appears that appellants were not creditors until more than three years afterwards. It would be only their existing creditors who could complain of the confession of a judgment by their debtor, and, moreover, then, if the proposition were true that an insolvent corporation cannot confess judgment whereby a preference is given to one of its creditors, this renders the judgment only voidable, and it is not subject to collateral attack. The demurrer was properly overruled, and we find no error apparent on the face of the record. The judgment will therefore be affirmed.

Gooding C. J., and Sloan, J., concurring.

[Civil No. 318. Filed January 16, 1892.]

[29 Pac. 893.]

CHARLES G. JOHNSTON, Plaintiff and Appellant, v.  
JAMES LETSON et al., Defendants and Appellees.

1. **APPEAL AND ERROR—BOND—SUFFICIENCY—UNDERTAKING—JURISDICTION—REV. STATS. ARIZ. 1887, SEC. 859, CH. 20, TITLE 15, CITED AND CONSTRUED.**—If an undertaking, filed in lieu of the bond on appeal required by the statute, *supra*, complied with its requirements necessary to give this court jurisdiction, the form might be disregarded. Where such undertaking is not made payable to the appellee, nor to any one, and only undertakes to pay all damages and costs which may be awarded against him on appeal not exceeding three hundred dollars, and is not conditioned that appellant will prosecute his appeal with effect, it does not comply substantially with the statute, *supra*, and the appeal must be dismissed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. R. E. Sloan, Judge. Dismissed.

The facts are stated in the opinion.

George G. Berry, for Appellant.

James Reilly, for Appellees.

GOODING, C. J.—In this action motion is filed to dismiss appeal because this court has no jurisdiction of the case. The objection to the jurisdiction is based on the absence of a bond such as required by the statute. While this court desires to decide every case on its merits, it cannot take jurisdiction contrary to the statutes of the territory. Section 859 (ch. 20, tit. 15) specifically provides what kind of a bond shall be given on appeal. It provides, among other things, that the appellant shall execute a bond payable to the appellee in a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk, and conditioned that such appellant shall prosecute his appeal with effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the appellate court. In this case there is no bond, but an undertak-

ing. If the undertaking complied with the requirements of the statutes necessary to give this court jurisdiction, the form of the instrument we might disregard; but the essential elements, made essential by the statutes, we cannot overlook.

1. The undertaking is not made payable to the appellee, nor, for that matter, to any one else.

2. The undertaking is to pay "all damages and costs which may be awarded against him on appeal, not exceeding three hundred dollars." The statute provides that a bond shall be "in a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk, conditioned that the appellant shall pay all other costs which have accrued in the court below, or which may accrue in the appellate court." The language of the undertaking is "that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound." This is not the undertaking or bond required by the above statute. By the statute the condition of the bond must be to "pay all the costs which have accrued in the court below, or which may accrue in the appellate court." A bond limiting the amount to three hundred dollars, or any other sum, is not a compliance with the statute. If we assume that three hundred dollars was double the probable amount of costs as estimated by the clerk, the bond would not be sufficient. The estimate of the clerk does not dispense with the requirement of the statute that the sureties shall be held for all the costs of the court below and the appellate court.

3. The bond is not conditioned that appellant will prosecute his appeal with effect. We would again, as this court has done before, urge upon the profession the necessity of adhering to the requirements of the statutes, at least in matters of substance, and express our regret that in too many cases the rights of parties cannot be protected in this court for the want of jurisdiction, in some cases, and the failure of counsel to present a record on which this court can consider the errors complained of in the court below, in other cases. The appeal will be dismissed.

Kibbey, J., and Sloan, J., concur.

[Criminal No. 64. Filed January 16, 1892.]

[29 Pac. 894.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.  
WILLIAM YOUREE, Defendant and Appellant.**

1. **LARCENY—EVIDENCE—IMPEACHING WITNESS.**—When a self-confessed accomplice had testified that the horse stolen was brought into camp by the brother of the accused, it was error for the trial court to refuse to permit the accused to ask the accomplice, "Did you not testify in the examining court that you really were the party that had taken the horse?"
2. **EVIDENCE—RELEVANCY—ADMISSION AS TO PREVIOUS ARREST FOR OTHER CRIME.**—Evidence of the admission of the defendant that he was arrested for robbing the government, and that it cost him a good deal of money to get out of it held irrelevant where it had no connection with the crime charged and reversible error as tending to prejudice the jury.

**APPEAL** from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. **Reversed.**

The facts are stated in the opinion.

Wilson & Norris, and Herndon & Hawkins, for Appellant.

The admission of evidence in the trial of a criminal cause which is not in some way connected with, and tends to prove, the direct issue joined, and especially if it tends to prejudice the rights of the defendant who is upon trial, is reversible error.

Defendant is charged with the larceny of a certain horse. This is the only issue. Statements of witness in regard to what one of the rodeo party said about the stealing of another horse are not legitimate, but damaging because of their tendency to incline the jury to conviction on general principles, whether the particular issue be proven or not. See, 2 Bishop on Criminal Procedure, sec. 750; Wharton on Criminal Evidence, sec. 225; *Harris v. State*, 1 Tex. App. 74; *Davis v. State*, 37 Tex. 227; *State v. Stubbs*, 49 Iowa, 204, 205; *Bergen v. People*, 17 Ill. 427, 65 Am. Dec. 672.

That other offenses cannot be proven, see *Thomas v. People*, 67 N. Y. 222, 223.

William Herring, Attorney-General, and H. D. Ross, District Attorney, for the Territory

GOODING, C. J.—The record in this case discloses the fact that appellant was convicted of the crime of larceny—the theft of a horse—by the testimony of a self-confessed accomplice in the crime. If it can be said that there was corroborating evidence at all, it was of the most light and unsatisfactory character. This witness, Oliver Mathews, *alias* Moore, was, on his own statement, more active in the crime than the appellant, and outside of his evidence and the little and uncertain evidence of his brother, who had come from Texas to help him out of his trouble, there was no evidence whatever to connect the appellant with the crime charged in the indictment. We will only notice two of the errors apparent in the record.

1. The self-confessed accomplice, Mathews, *alias* Moore, had testified that the stolen horse was brought into camp by Joe Youree, the brother of the accused. He was asked the question, “Did you not testify in the examining court that you really were the party that had taken this horse?” Objection was made to this question, and the objection sustained, and exception taken. We think the witness should have been required to answer this question. If he did so testify before the examining court, his testimony there was materially different from his testimony on the trial. If he had denied so stating, the defendant might have proceeded to impeach his testimony by other witnesses after laying the proper foundation. If he had made contradictory statements, and had so admitted, or it had been proved by other witnesses, this fact, in connection with the discredit attaching to him as a confessed accomplice, might have entirely destroyed his evidence before the jury; and without his evidence there was nothing to sustain a verdict of guilty.

The other error apparent on the record was the evidence of the witness H. A. Owens, admitted over the objection of the defendant. This witness was permitted to testify that on his way to Harqua Hala he saw the defendant (appellant) camped out in the bushes. The following questions were put

and answers made: "Question. Was any one else camped there?—Answer. Yes, sir; some Mexican teamsters.—Q. Which way were you traveling at that time?—A. Out to Harqua Hala.—Q. Which way was he traveling?—A. Towards Harqua Hala.—Q. What did he say he was going for?—A. He did not say. He said he was arrested down there for robbing the government, and said it cost a good deal of money to get out of it." The above answer, it is needless to say, was well calculated to prejudice the minds of the jury, and bear heavily against the prisoner. It had no sort of connection with the commission of the crime charged in the indictment. It is true that it was not an admission that he was guilty of the crime of robbing the government. But to say that such evidence would not operate to the prejudice of the defendant would be to hold that no irrelevant evidence could operate to the prejudice of a person charged with crime. None of the evidence of this witness had the slightest connection with the crime charged. The defendant had no horses with him that the witness saw. No allusion was made to the crime, nor was the conversation near the scene of the crime, so far as the evidence shows. We deem it unnecessary to consider the other errors complained of. The judgment will be reversed, and a new trial granted.

Kibbey, J., and Sloan, J., concur.

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[Civil No. 260. Filed January 26, 1892.]

[29 Pac. 15.]

HENRY A. SMITH et al., Plaintiffs and Appellants, v.  
B. BLACKMORE, Defendant and Appellee.

1. **APPEAL AND ERROR—BILL OF EXCEPTIONS—WHAT CONSTITUTES.**—A paper purporting to be an agreed statement of the case, if presented to the trial judge, and by him settled and signed, as required by the statutes, and filed within the time allowed, can be considered a bill of exceptions, under authority of *Putnam v. Putnam*, ante, p. 182, 24 Pac. 320.
2. **SAME—AGREED STATEMENT—SIGNING—REV. STATS. ARIZ. 1887, PAR. 874, CITED.**—The agreed statement of the case, permitted by stat-

ute, *supra*, must be signed and allowed by the trial judge, or it will be stricken from the record.

3. SAME—RECORD—ABSENCE OF BILL OF EXCEPTIONS AND STATEMENT OF FACTS—SCOPE OF REVIEW—JUDGMENT-ROLL.—Where there is no bill of exceptions, statement of facts or motion for new trial in the record, there is nothing to review except the judgment-roll, and, when there is no error therein, the judgment will be affirmed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Ben Goodrich, for Appellant.

George G. Berry, for Appellee.

SLOAN, J.—The record in this case is defective. No bill of exceptions, statement of facts, or motion for new trial appears therein. There was signed by the attorneys of record, and filed among the papers copied into the transcript, a paper purporting to be an agreed statement of the case and facts proven at the trial, permitted under paragraph 874 of the Revised Statutes. This paper was probably meant to take the place of both a bill of exceptions and a statement of facts. It embodied some of the characteristics of a bill of exceptions; and, under the authority of *Putnam v. Putnam*, *ante*, p. 182, 24 Pac. Rep. 320, had it been presented to the trial judge and by him settled and signed, as required by the statutes, as well as filed within the time allowed, it could have been considered as such. It fell short of a proper bill of exceptions in each of these particulars. Nor can it be considered as a proper agreed statement of the case permitted under said paragraph 874, inasmuch as it was not allowed nor signed by the trial judge, as provided therein. No agreement of counsel can take away the right, nor make it any less the duty, of the judge, under the statute, to approve and sign the statement before it becomes a part of the record. It is entitled to become a part of the record only by virtue of the allowance and signature of the judge, and, if these are wanting in any agreed statement attempted to be made and filed under said paragraph, it must be rejected as improperly in the record.



There is nothing, therefore, in the record to review except the judgment-roll, and, as no error appears therein, the judgment must be affirmed; and it is so ordered.

Gooding, C. J., and Kibbey, J., concur.

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[Civil No. 334. Filed January 26, 1892.]

[29 Pac. 648.]

JOHN BISHOP, Plaintiff and Appellant, v. E. B. PERRIN,  
Defendant and Appellee.

1. **FORCIBLE ENTRY AND DETAINER—STATUTORY REMEDY.**—The action of forcible entry and detainer does not exist independent of statute.
2. **SAME—ISSUE INVOLVED—JURISDICTION—SUMMARY REMEDY—REV. STATS. 1887, PAR. 2016, CITED.**—Statute, *supra*, provides that the only issue shall be the right of actual possession. The action may be tried by the probate judge or justice of the peace, and is summary in character.
3. **SAME—APPEALS—WHEN PERMITTED—REV. STATS. 1887, PAR. 2026, CITED AND CONSTRUED.**—Statute, *supra*, grants the right of appeal when the damages exceed one hundred dollars, but in no case from a judgment on the "right of actual possession." The general statute of appeals does not apply except where the appeal is specially allowed.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Edmund W. Wells, Judge. Dismissed.

The facts are stated in the opinion.

Herndon & Hawkins, and Norris & Ellinwood, for Appellant.

Baldwin & Johnston, for Appellee.

PER CURIAM.—The action of forcible entry and detainer is one existing by virtue of the statute solely on that subject. It does not exist independent of the statute. Paragraph 2016

of the Revised Statutes of 1887 provides as follows: "On the trial of any case of forcible entry or of forcible detainer under the provisions of this act, the only issue shall be as to the right of actual possession, and the merits of the title shall not be inquired into." A probate judge or a justice of the peace may try an action under this statute. They cannot try any action where the title to real estate comes in question. The action is summary in its character. Paragraph 2026 provides: "After trial upon the merits the proper judgment shall be rendered upon the law and the facts, or upon the verdict of the jury, as the case may be; and the judgment of the district court, finally disposing of the cause, shall be conclusive of the litigation, and no further appeal shall be allowed, except where the judgment shall be for damages in an amount exceeding one hundred dollars." This, by implication, gives a right of appeal when the damages exceed one hundred dollars, but prohibits an appeal where the damages are less than one hundred dollars. The appeal is granted on account of the excess of damages over one hundred dollars, but in no case on account of the finding and judgment on the "right of actual possession," the thing to be determined by the action. The damages are the incident. Since the statute does not provide for an appeal in any case to correct any error affecting the main question occurring on the trial in the district court,—that is, the right of actual possession,—but does provide for an appeal where the damages exceed one hundred dollars, we must conclude that no appeal was intended in any other case arising under this statute. The narrow compass of the issue, and the summary manner provided for deciding it, strengthens this view. We are further of the opinion that the general statute providing for appeals does not apply to any case arising under this special statutory cause of action and proceeding, except in the one instance where the damages exceed one hundred dollars.

[Civil No. 304. Filed January 26, 1892.]

[29 Pac. 1006, *sub nom.* Springfield Fire and Marine Insurance Co. v. White.]

WILLIAM J. WHITE, Plaintiff and Appellee, v. THE  
SPRINGFIELD FIRE AND MARINE INSURANCE  
COMPANY, Defendant and Appellant.

1. APPEAL AND ERROR—MOTION FOR NEW TRIAL—TIME FOR FILING—REV. STATS. ARIZ. 1887, PAR. 836, CITED.—Statute, *supra*, requires the filing of motion for new trial within two days after rendition of judgment. Where the record does not disclose any reason why a motion for new trial was not filed within the statutory time it will be presumed there was no good reason, and, the filing thereafter not being authorized by statute, the motion cannot be considered.
2. SAME—BILL OF EXCEPTIONS—TIME FOR FILING—ORDER PERMITTING FILING NUNC PRO TUNC—TRIAL—DENIAL OF MOTION FOR NEW TRIAL—CONCLUSION OF—REV. STATS. ARIZ. 1887, PAR. 828, CITED.—The motion for new trial having been denied, and that being taken as the time of the conclusion of the trial, where the record fails to show that the bill of exceptions was presented to the court within the ten days thereafter as required by statute, *supra*, the entry of a *nunc pro tunc* order permitting the filing as within the statutory time, in absence of good cause shown, was unauthorized and will not be recognized by this court as making it a part of the record nor as saving the motion for new trial incorporated therein.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

H. N. Alexander, for Appellant.

C. F. Ainsworth, for Appellee.

The bill of exceptions in this case was not presented to the judge before whom it was tried for his allowance within the time prescribed by paragraph 828 of the Revised Statutes of 1887,—viz., within ten days after the conclusion of the trial. There is no authority for allowing a bill of exceptions after

the expiration of the time prescribed by statute within which the bill shall be presented to the trial judge for his allowance. In the case of *Cameron v. Sullivan*, 15 Wis. 510, the supreme court, on motion to strike out the bill of exceptions, says: "We know of no statute or rule of court which authorizes the signing and settling of a bill of exceptions after such a lapse of time. *State v. Smith*, 38 Kan. 194, 16 Pac. 254.

In *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676, it is held that when the court allowed and signed a bill of exceptions after the time prescribed it was a mere nullity. *Doherty v. Lincoln*, 114 Mass. 362; *Conway v. Callahan*, 121 Mass. 165; *Purcell v. Boston etc. S. S. Line*, 151 Mass. 158, 23 N. E. 834; *Fetchhinner et al. v. Trownstein*, 20 Pac. 704; *Weshmier v. State ex rel. Wilcox*, 110 Ind. 523, 11 N. E. 291.

It is the duty of a party bringing a cause to the supreme court to see to its proper preparation for an appeal, and when the record does not disclose that it was through the fault of the trial judge or opposite party that appellant's bill of exceptions was not filed within the time prescribed by the statute, the presumption of negligence is against the appellant, and it cannot complain if its bill of exceptions is not legally before the appellate court. *G. C. and S. F. Ry. Co. v. Holliday*, 65 Tex. 512.

GOODING, C. J.—The record in this case shows that the judgment was rendered on the tenth day of December, 1888; that the statement of facts and motion for a new trial were filed on the thirty-first day of January, 1889; that the statement of facts was agreed upon by counsel, and approved by the court, on the thirtieth day of January, 1889. The motion for a new trial is in the bill of exceptions, and nowhere else appears on the record. The statute expressly provides that a motion for a new trial shall be made within two days after rendition of judgment. Par. 836, Rev. Stats. 1887. The judgment having been rendered on the tenth day of December, and the motion for a new trial filed on the thirty-first day of January, it comes after the time fixed by the statute. The record does not disclose any reason why this motion was not filed in the statutory time. We must assume, therefore, that there was no good reason, and that the filing of the motion thereafter was not authorized by the statute. We cannot, there-

fore, consider the motion for a new trial, unless the fact that it is set out in the bill of exceptions places it before this court. The record shows by the clerk's entry that the motion for a new trial was overruled February 4, 1890, and notice of appeal filed on that day. The record contains this entry: "Comes now the defendant, by H. N. Alexander, its attorney, and on motion leave is granted to file bill of exceptions *nunc pro tunc* as of February 6, 1890." And this further entry, on same day: "And thereafter, on the nineteenth day of February, 1890, *nunc pro tunc* February 6, 1890, the defendant filed its bill of exceptions in words as follows, to wit." Then follows the bill of exceptions. The motion for a new trial is set out in this bill of exceptions. That is the bill of exceptions before this court for its consideration. It will be remembered that the motion for a new trial was overruled February 4, 1890. If the *nunc pro tunc* order made on the 19th can be recognized as a proper order by this court, then the bill of exceptions was filed in the proper time, that is, within ten days after the conclusion of the trial. The motion for a new trial having been denied on the 4th of February, and that being taken as the time of the conclusion of the trial, there is nothing before this court to show that the bill of exceptions was presented to the court or judge within the ten days fixed by the statute. Rev. Stats., par. 828. The record does show that on the nineteenth day of February, 1890, on motion of the defendant below, the court did authorize the entry of the *nunc pro tunc* order. There is no cause shown why this bill was not presented to the judge within the ten days; nothing to show that it was the fault of the judge, and not the fault of the defendant (appellant) that said bill was not, at least, presented within the statutory ten days. In the absence of some such showing, we think it is clear that the trial court had no authority to extend the time fixed by the statute, and that, the *nunc pro tunc* order being made without anything in the record to warrant it, it cannot be recognized by this court. We therefore conclude that the bill of exceptions is no part of the record, and that the motion for a new trial is not saved thereby. But, if it could be held to be in the record by virtue of the bill of exceptions, the motion itself was not filed till fifty-one days after the judgment was rendered, and

therefore cannot be considered by us. This leaves the case to rest in this court on the complaint and judgment. We think the complaint states a cause of action that warrants the judgment, and therefore the judgment below should be affirmed. It is so ordered.

Sloan, J., and Wells, J., concur.

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[Civil No. 281. Filed January 26, 1892.]

[28 Pac. 958.]

GEORGE T. MARTIN et al., Plaintiffs and Appellants, v.  
WELLS, FARGO & COMPANY'S EXPRESS, Defendant and Appellee.

1. SET-OFF—POWER OF COURT NOT STATUTORY—DISCRETIONARY—REVIEWED ONLY FOR ABUSE.—The power of a court to set-off mutual judgments is inherent. It rests upon its general jurisdiction over its judgments, not upon statute. The exercise of the power is discretionary and will be reviewed only for abuse.
2. SAME—ASSIGNMENTS—NOTICE—SEC. 5, CH. 48, COMPILED LAWS ARIZ. 1877, CONSTRUED.—Statute, *supra*, expresses the equitable doctrine of assignment, that is: that it carries with it all existing equities together with any which may thereafter arise between the assignor and his debtor before notice of the assignment to the latter which might be urged by him as a proper set-off.
3. ASSIGNMENTS—RECORDING—ABSENCE OF STATUTE—NOT CONSTRUCTIVE NOTICE.—Where there is no law providing for the recording of assignments of judgments in the county recorder's office such record does not give constructive notice.
4. SAME—NOTICE—BURDEN OF PROOF.—The burden of proof is on the assignee to show that the judgment debtor had notice of the assignment before his set-off was obtained. In absence of proof that the debtor had notice of the assignment prior thereto the right of set-off still exists.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Maxwell & Satterwhite, for Appellants.

The doctrine of set-off, as a remedy, was entirely unknown to the common law, and mutual debts were inextinguishable, except by actual payment or release. 7 Wait's Actions and Defenses, 473; *Commonwealth v. Clarkson*, 1 Rawle, 291; *Merriweather v. Bird*, 9 Ga. 594.

It has rested entirely on statutory enactments for its existence. Hence, it cannot be extended beyond such enactments. In this territory it is not authorized, except in actions pending in court. It has no application to claims which have been liquidated by judgment. We have no statutory authority for setting off judgments against each other.

It is true that the right of set-off grew into use, in some states more than others, under different kinds of statutes, and was finally extended to judgments; but the undoubted weight of authority has been, that the right of set-off is limited to mutual connected debts. 7 Wait's Actions and Defenses, 473; *Hurlbert v. Pacific Ins. Co.*, 2 Sum. 477, Fed. Cas. No. 6919; *White v. Governor*, 18 Ala. 767; *McLean v. McLean*, 1 Conn. 397; *Baltimore Ins. Co. v. McFaden*, 4 Har. & J. 31. The doctrine of these cases is in harmony with our statute—paragraph 741.

The weight of adjudged cases, upon which the text-books are based, shows the rule to be that the set-off must have been presented to the court and pleaded while one of the actions was pending in court. *Pierce v. Bent*, 69 Me. 385; *Duchess of Kingston's case*, 2 Smith's Leading Cases, 573.

In some of the states the statutes affirmatively authorize the setting off of judgments against each other after they are rendered, and upon such statutes the practice has grown into general use, in so much that the courts in some of the states allow such set-offs simply on motion of one or the other of the parties after both judgments are rendered. Freeman on Judgments, sec. 467a.

But in this territory there is no statute authorizing the setting off of judgments against each other on motion or otherwise; nor do courts have any such equitable powers over judgments as is claimed for the courts of some of the states by the author above cited. When judgments are rendered and are ready for execution the courts cease to have any further juris-

diction or control over them, or over the parties or causes of action. There can be but one answer to such judgments—to wit, payment. 7 Wait's Actions and Defenses, 526; *Thorpe v. Wegefarth*, 56 Pa. St. 82, 93 Am. Dec. 789.

It is quite immaterial, however, to the appellant in this case what the doctrine may be as to the right or mode of setting off judgments against each other between the original parties,—as contemplated in the authority above referred to,—so long as the rights of third persons are not interfered with; for the same authority which is cited and relied upon for setting off judgments between the original parties also states that judgments cannot be set off against each other where one of them was assigned to a third person in good faith before the other was obtained. This was the fact in this case. See Freeman on Judgments, sec. 467a; *Pierce v. Bent*, 69 Me. 381.

When one debt is absolutely assigned to a stranger, pending the action, and before it is liquidated by a final judgment, the same cannot be set-off against the other on motion where the two debts have no connection with each other. Waterman on Set-offs, p. 398.

The right to set off one judgment against the other by a motion to a court of equity, or by a summary application to the equitable powers of a court of law, only exists in those cases where the debts on both sides have been finally liquidated by judgments before the assignment of either to a third party. Waterman on Set-offs, p. 398; 7 Wait's Actions and Defenses, 527; *Gay v. Gay*, 10 Paige, 369; *Swift v. Prouty*, 64 N. Y. 546.

The courts refuse to set off judgments in cross actions, between the same parties, where it appears that other persons are interested by assignment of the demand on which one of the judgments was rendered. 7 Wait's Actions and Defenses, 530; *Makepeace v. Coats*, 8 Mass. 451, 452; *Duncan v. Bloomstock*, 2 McCord, 318, 13 Am. Dec. 728, and note.

To a judgment there can be no set-off of a debt not in judgment. 7 Wait's Actions and Defenses, 526, 527; *Thorpe v. Wegefarth*, 56 Pa. St. 82, 93 Am. Dec. 789; *Garrick v. Jones*, 2 Dowl. P. C. 157; *Dunken v. Vandemburgh*, 1 Paige, 622; *Bagg v. Jefferson*, 10 Wend. 615; *Bradley v. Morgan*, 2 A. K. Marsh, 369.

The spirit of this rule is that the subject-matter of the set-



off must be clear, indisputable, and conclusive upon the parties, and must have passed the ordeal of a judicial determination before it can be used as a set-off against a judgment; and this must have been done, too, before the judgment sought to be set off was assigned to an innocent third party. *Harris v. Palmer*, 5 Barb. 105.

Jeffords & Franklin, for Appellee.

As to the power of the court, upon motion to set off one judgment against another, Mr. Freeman in his book on Judgments says: "The satisfaction of a judgment may be wholly or partly produced by compelling the judgment creditor to accept in payment a judgment against him in favor of the judgment debtor; or, in other words, by setting off one judgment against the other. This is usually brought about by a motion in behalf of the party who desires to have his judgment credited upon or set off against a judgment against him. The court in a proper case will grant the motion. Its power to do this cannot be traced to any particular statute, and exists only in virtue of its general equitable authority over its officers and suitors. This authority was formerly restricted by courts of equity, but now is very generally exercised by courts of law. . . . It is well settled, both in England and this country, that judgments in cross actions may be set off, the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions are pending. If the amounts are equal, both will be satisfied. If the amounts are unequal, the smaller will be satisfied in full, and the larger to the extent of the smaller, and an execution will issue for the balance." Freeman on Judgments, sec. 467a; *Pierce v. Bent*, 69 Me. 385. Both the above authorities are cited by appellant as holding a different principle.

"Where there are two actions in the same court, at the same time, wherein the plaintiff in each is entitled to judgment, and wherein the creditor in one is the debtor in the other, and a motion is made to the court to set one judgment off against the other, so far as one will extend towards the satisfaction of the other, the court will make the set-offs if other rights do not interfere." Waterman on Set-offs, sec. 338, p. 373.

"The practice of setting off one judgment, between the same parties and due in the same right, is ancient and well established. Some of the adjudged cases go upon the principle of extending the statutes of set-off in their spirit of equity and justice. Others hold the exercise of the power independent of the statutes of set-off and rest it upon the general jurisdiction of a court over the cause and the parties when before them." *Holmes v. Robinson*, 4 Ohio, 90.

"The power to set one judgment against another is an inherent one, and the equitable power which the common-law courts originally possessed." *Burns v. Thornburgh*, 3 Watts, 78.

"The law of set-off *before* judgment is regulated entirely by statute. When the mutual claims of parties have passed into judgments, it is the practice of the courts to set off one judgment against the other. This practice does not rest on any statute but upon the general jurisdiction of courts over the suitors in them." *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704, and note.

The inherent power of the court to set off, upon motion, one judgment against another, is recognized in Wait's Actions and Defenses and the authorities there cited. 7 Wait's Actions and Defenses, p. 525.

The principle is also recognized by the supreme court of the United States. In *Blount v. Windley*, Mr. Justice Miller says: "The courts of common law have long established the principle of set-off as applicable to mutual judgments in the same court. And it is said that this power of setting off judgments, not only in the same court, but in different courts, did not depend upon the statutes of set-off, but upon the general jurisdiction of the court over its suitors. See *Barker v. Braham*, 2 Bl. R. 869; *Mitchell v. Oldfield*, 4 T. R. 123; 3 Caines' cases 190." *Blount v. Windley*, 95 U. S. 173-180.

SLOAN, J.—On the ninth day of September, 1886, in the district court in and for the county of Pima, George T. Martin recovered judgment against Wells, Fargo & Company's Express in the sum of \$1,848.35. Afterwards, and pending a motion for a new trial, Martin remitted the sum of \$319.35 of said judgment, leaving \$1,529 as the judgment in force. This judgment was appealed from by Wells, Fargo & Com-

pany's Express, and affirmed in this court February 15, 1889, *ante*, p. 57, 20 Pac. 673. On the ninth day of October, 1886, while the motion for a new trial was still pending, and before the appeal was taken, Martin assigned his judgment to one H. D. Underwood by an instrument in writing which reads as follows: "In the district court of the first judicial district in and for the county of Pima. George T. Martin vs. Wells, Fargo & Company's Express, a corporation. Judgment docketed for \$1,529, net, and costs. For value received, I hereby assign, transfer, and set over the above-mentioned judgment to H. D. Underwood, of Tucson, A. T., with orders to pay the following amounts, viz.: C. H. King, \$125.00; Geo. L. Hood, \$125.00; A. B. Sampson, \$100.00,—allowing all lawful proceedings therein, saving the said H. D. Underwood harmless and from any costs in the premises. In witness whereof I have hereunto set my hand and seal this 9th day of October, 1886. Geo. T. Martin." Afterwards, on the twentieth day of October, 1886, Wells, Fargo & Company's Express obtained judgment in the county court of said county of Pima against said George T. Martin in the sum of \$1,828.50. On the second day of March, 1889, after the judgment in the suit of Martin against Wells, Fargo & Company's Express had been affirmed in this court, said Wells, Fargo & Company's Express filed its motion in said district court to set off the two judgments. At the hearing, Underwood, as the assignee of the Martin judgment, appeared and resisted said motion. After hearing the proofs offered, the court allowed the motion, and granted the set-off. From this order Underwood appeals to this court.

Both judgments, at the time the order was made, were among the records of said district court, as we take judicial notice that, by an act of the legislative assembly approved March 2, 1887, the county court in which the judgment against Martin was rendered was abolished, and its records transferred to and made part of the records of said district court. The power of a court of law, in a proper proceeding, to set off one judgment against another, when the demands remain mutual, is undoubted. It does not depend upon any statute, but rests upon the general jurisdiction of a court over its judgments and its suitors when before it. The practice is so ancient and well established that it is now regarded as one of the inherent

powers of a court of law. The exercise of this power rests within the discretion of the court, and its action is therefore not ordinarily subject to review, and will only be disturbed when it appears that it has operated to the injury of third parties, or when for some other reason it appears that there has been a manifest abuse of discretion.

But one question is presented by the record in this case, and that is whether or not it appears that the setting off of the judgment obtained by Wells, Fargo & Company against the judgment obtained by Martin has operated to deprive Underwood of any right he may have had by virtue of the assignment to him of the Martin judgment. Without a statute, a judgment is assignable only in equity. Such an assignment carries with it all existing equities, including the right of set-off between the assignor and the judgment debtor. Not only does the assignment carry with it all existing equities, but also any which may thereafter arise between the assignor and the judgment debtor before notice of the assignment to the latter which might be urged by the latter as a proper set-off to the judgment. The only statute upon the subject of assignment of judgments, as well as other non-negotiable choses in action, in force at the date of the assignment of the Martin judgment to Underwood, was section 5 of chapter 48, Compiled Laws, which provided that, "in case of an assignment of a thing in action, the action of an assignor shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment," and which simply expressed what was the equitable doctrine of assignments in the absence of a statute. The assignment of the Martin judgment was made on the ninth day of October, 1886. Without expressing any opinion as to whether this assignment from its terms was anything more than an assignment for the benefit of certain creditors named therein, we will, however, assume that it was an absolute assignment for value, subject, however, to such equities as an assignment of a non-negotiable chose in action carries with it. Was there, then, on the date of the assignment, any existing equity in the way of a right of set-off between Martin and Wells, Fargo & Company? If so then the assignment to Underwood carried with it such equity. The bill of exceptions purports to contain all the evidence ad-

duced at the hearing of the motion. It sets forth that the judgment obtained by Wells, Fargo & Company, and set off against the judgment obtained by Martin and assigned to Underwood, was rendered on the twentieth day of October, 1886. When the demand arose which was the basis of this judgment does not appear. It is fair to presume that, if it was a liquidated demand at the time of judgment rendered in the suit of Martin, it would have been set off in that action. If it was unliquidated it could not have been set off until it ripened into judgment, and hence could not have constituted an existing equity at the date of the assignment. If, then, no equitable right of set-off existed at the date of the assignment, it becomes important to know in this connection whether any existed before Wells, Fargo & Company's Express had notice of the assignment. There is no evidence as to whether or not the corporation had such notice. Underwood attempted, long after the judgment obtained against Martin had been entered, to give constructive notice by filing and recording his assignment in the county recorder's office of Pima County. Even had it not been after the right of set-off unquestionably arose between the original parties interested, this did not amount even to constructive notice, inasmuch as no law provided for the recording of such assignments. Underwood having appeared in the court below to resist the motion upon the ground that he was the equitable owner of the judgment, and upon the face of the record Martin still appearing to be the owner thereof, it seems to us that the burden rested upon Underwood to show that Wells, Fargo & Company's Express had notice of the assignment before judgment was obtained by it against Martin, when the right of set-off must unquestionably have existed had no assignment been made. We are aware of the case of *Graves v. Woodbury*, reported in 4 Hill, 559, 40 Am. Dec. 296, which seems to assert a contrary doctrine, and to hold that, when a judgment debtor seeks to set off, as a claim against his judgment creditor, a judgment which has been assigned without notice to him, to entitle him to the remedy he must show, that, by reason of want of notice, he has been injured thereby. We see no reason or justice in this rule, nor does it comport with the section of the statute which we have quoted above. The judgment debtor is certainly entitled to notice so

that he may thereafter be put upon his guard against dealing with the assignor, or perhaps obtaining other demands against him on the belief that the assignor is still his creditor. If this is not done, he is entitled to be protected. It being the duty of the assignee to give notice to the judgment debtor of the assignment, in order, therefore, to defeat the right of set-off between the judgment debtor and his assignor which the former seeks to enforce against the judgment the assignee must show that he gave the judgment debtor notice, or that in some way the latter had actual notice of the assignment before the right originated. There being no proof that Wells, Fargo & Company's Express had notice of the assignment of the Martin judgment before obtaining judgment against Martin, we cannot, therefore, find that the court erred in setting off the two judgments, and its judgment is therefore affirmed.

Gooding, C. J., Kibbey, J., and Wells, J., concur.

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[Civil No. 313. Filed January 26, 1892.]

[29 Pac. 430.]

**YAVAPAI COUNTY, Plaintiff and Appellant, v. WILLIAM  
O. O'NEILL, Defendant and Appellee.**

1. **COUNTIES—CLAIM FOR MONEY AGAINST—NECESSITY FOR PRESENTATION OF CLAIM TO BOARD OF SUPERVISORS—REV. STATS. ARIZ. 1887, PARS. 384, 407, 552, CITED AND CONSTRUED AND REMEDY PROVIDED HELD EXCLUSIVE.**—Presentation of a claim against a county to the board of supervisors for its action is a condition precedent to the maintenance by the claimant of an action thereon, and the remedy prescribed by statutes, *supra*, for the establishment and enforcement of claims for money against the county is exclusive.
2. **SAME—SAME—CLAIMS ALLOWED IN PART—CLAIMANT MUST ACCEPT AS FULL SETTLEMENT OR WHOLLY REJECT—REV. STATS. ARIZ. 1887, PARS. 414 AND 383, CITED.**—Paragraph 414, *supra*, requires the claimant, if he be dissatisfied with the allowance by the board to either forego the part rejected or submit his claim as a whole to the courts. An agreement between the board of supervisors and the claimant, providing that the acceptance by the claimant of a warrant for a part of his claim shall not operate to affect the claimant's right to proceed by suit to establish his whole claim, is void.

3. SHERIFF'S FEES—EXECUTING WARRANT OF ARREST—OUTSIDE OF TERRITORY—REV. STATS. ARIZ. 1887, PARS. 1972 AND 1277, CITED.—To execute a warrant of arrest is to actually effect the arrest by virtue of and in obedience to the mandate of the writ, and make of the person therein named the disposition required. A warrant of arrest issued out of any court in this territory cannot be executed, in a legal sense, outside of the territory. No fee can be, under the statutes, *supra*, charged for travel beyond the territory in the execution of a warrant of arrest.
4. COUNTIES—CONTRACTS—CHAIRMAN OF BOARD OF SUPERVISORS—DISTRICT ATTORNEY—POWER TO BIND COUNTY.—Whether the board of supervisors could make a valid agreement to pay compensation for arrest made outside the territory is not determined. The chairman of the board, by virtue of his office, cannot bind the county, nor can the district attorney.
5. EVIDENCE—MINUTES OF BOARD OF SUPERVISORS, BEST EVIDENCE—PRESUMPTIONS—PAROL EVIDENCE NOT ADMISSIBLE—REV. STATS. ARIZ. 1887, PARS. 394, 395, CITED.—Statutes, *supra*, require that the clerk of the board of supervisors shall record all proceedings of the board, and that the board must cause such a record to be kept. It will be presumed that the board and its clerk have done their duty and, if the board made an order, that there is a record of it. Such record is the best and only evidence of such order. In the absence of a showing that there is no record of the action of the board, parol evidence is not competent to prove the action of the board.
6. BOARD OF SUPERVISORS' POWER TO BIND COUNTY FOR MILEAGE IN SERVING SUBPENA OUTSIDE OF THE TERRITORY—REV. STATS. 1887, PAR. 579, CLAUSE 9, CITED.—Where it appears from the records of the proceedings of the board of supervisors that the sheriff shall be allowed mileage to subpoena witnesses without the territory in a specified case, such employment is sufficient to bind the county; the board having power, under statutes, *supra*, to employ means to secure the attendance of necessary witnesses who cannot be secured by the ordinary process of the court.  
GOODING, C. J., dissents.
7. EVIDENCE—CONTENTS OF TELEGRAM—PAROL EVIDENCE—FOUNDATION—COMMUNICATIONS BETWEEN PLAINTIFF AND THIRD PARTIES.—In an action by a sheriff against a county for fees a witness was permitted to testify to the contents of certain telegrams. This was erroneous as the proper foundation was not laid for the admission of parol evidence of their contents, and because communications between a sheriff and a third person are incompetent to establish an agreement between the sheriff and board of supervisors relative to the subject-matter of such communications.
8. SHERIFFS—FEES FOR EXECUTING A WRIT OF ARREST—REV. STATS. ARIZ., PAR. 579, CLAUSE 3, AND 1972, CONSTRUED—EXPENSES FOR

RETURNING PRISONER.—Under statutes, *supra*, for the arrest of a prisoner, and removing him to the court whence the writ issued, the only compensation to be allowed to the sheriff is two dollars for the service of the writ, and thirty cents for each mile, counting one way only, necessarily traveled in effecting such arrest and removal. In addition the sheriff is entitled to his expenses, other than personal, incurred in returning his prisoner.

9. SAME—FEES—SERVING SUBPENAS OUTSIDE OF COUNTY—MUST BE INDORSED UNDER PROVISIONS OF REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 2054, CITED.—The sheriff is not bound to serve a writ of subpoena in a criminal case upon a witness non-resident of the county where the trial is to be had unless it be indorsed by the trial judge as provided by statute, *supra*, and no fee for service of writ not so indorsed can be allowed as a legal county charge.

10. SAME—SAME—MILEAGE IN UNSUCCESSFUL ATTEMPTS TO ARREST NOT ALLOWED—REV. STATS. ARIZ. 1887, PAR. 1972, CITED AND CONSTRUED.—Fees for mileage traveled in unsuccessful attempts to execute warrants of arrest will not be allowed.

GOODING, C. J., and WELLS, J., dissenting.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Reversed.

The facts are stated in the opinion.

H. D. Ross, District Attorney, and Herndon & Hawkins, and E. M. Sanford, for Appellant.

Plaintiff, having regularly made out and presented his claim for services to the board of supervisors, and it having been acted upon by said board, and part thereof audited and allowed, and a warrant drawn for the amount so allowed, and having accepted said warrant, is precluded from maintaining this suit. If plaintiff was dissatisfied with the amount allowed him, he had his remedy, which was to sue upon his claim as first presented to the board. He cannot accept the amount so allowed and then sue for a balance.

Although the stipulation was made and signed by the chairman of the board that cannot serve the plaintiff in this action, for the reason that the stipulation itself shows that it is not the act of the board of supervisors, and even if it were, it was made without any right or authority of law, and was and is entirely outside and beyond the scope of the authority of the



said board of supervisors; and, further, said stipulation does not refer to the claim sued on.

Sections 414 and 415 (p. 131) of the Revised Statutes of Arizona provide the method and the only method which can and must be pursued in presenting claims against the county to the board of supervisors.

Boards of supervisors are purely creatures of the statute—they derive all their power and authority from the statute. *Robinson v. Supervisors of Sacramento*, 16 Cal. 212, 213; *Linden v. Case*, 46 Cal. 174.

The chairman could not bind the board by signing said stipulation. Section 391 of the Revised Statutes of Arizona is, "A majority of the board shall form a quorum for the transaction of business."

Nor could the board delegate such authority to the chairman.

The *board* passes upon all claims; the *board*, or a *majority*, can bind the county, not the chairman or any one member thereof, in allowing claims or in any matters relative to such claims; but after passing upon the claim and drawing the warrant, they have no more power or authority with respect to any matter, neither their acts or knowledge in respect thereto can bind the county. *Johnson v. Supervisor Dist.*, 67 Mo. 319; *Clancy v. County of Marion*, 77 Ill. 488; *Benton v. Board of Supervisors*, 84 Ill. 384; *Harrison v. Liston Dist.*, 47 Iowa, 11.

After the board had acted upon the claim of plaintiff, and drawn a warrant for the sum allowed, they had under the law exhausted their power and authority in the matter.

In passing upon claims against the county the board acts judicially—the allowance or rejection of the claim is the determination of the matter; their determination occupies the same relation to a claim that a judgment does to an action. *Tilden v. Sacramento County*, 41 Cal. 74; *El Dorado County v. Elstner*, 18 Cal. 149; *Colusa County v. De Jarnette*, 55 Cal. 375.

When the plaintiff had accepted the amount allowed by the board in July, he could not legally have any further claim for same services as contained in his said demand, and the filing and presenting a claim for the balance which had been

rejected by the board was and is wholly unauthorized by the law.

The authority of the board was exhausted when the board had considered and allowed part and disallowed part. After this action by the board plaintiff, accepting the allowance, had no claim to present. *Ryan v. Board of County Commissioners*, 32 Minn. 138, 19 N. W. 653.

Where an account is filed with board and allowed in part, and a warrant, drawn for the sum thus allowed, is accepted by the claimant, he thereby waives his right to appeal (or sue for the part disallowed). *Hamilton County v. Bailey*, 11 Neb. 56, 10 N. W. 539; *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423.

If a party sues in a court for a certain sum and recovers less than the amount sued for, and accepts the amount of the judgment, he cannot then appeal from such judgment. *Ind. District of Altoona v. District Township of Delaware*, 44 Iowa, 201.

When a party to a proceeding to assess damages accepted the amount assessed, he is not entitled to appeal. "A party cannot obtain the benefits of an adjudication and afterwards appeal therefrom." *M. and M. R. R. Co. v. Byington*, 14 Iowa, 572.

A garnishee who pays a judgment rendered against him cannot afterwards appeal. *Borgalthus v. F. & M. Ins. Co.*, 36 Iowa, 250.

When an act of the legislature makes an appropriation as in full payment of a demand, part of which was disallowed, the acceptance of the money is a bar to any further claim on account of such demand. *Massing v. State*, 14 Wis. 544.

In view of the proposition above set forth, and the authorities cited in support thereof, it is manifest that the complaint failed to state a cause of action.

The trial court permitted plaintiff to introduce in evidence the claim of plaintiff, which was made and filed with, and presented to, the board on August 24, 1889, a purported copy of which claim is attached to the complaint, and also permitted plaintiff to testify as to the items contained in said claim, to all of which defendant objected, for the reason that same

was incompetent and immaterial, and that it had not been shown that said claim had ever been acted upon by the board, and that the record of said board showed that the board declined to either allow or disallow the same, and had declined to act thereon.

Before the plaintiff would have the right to maintain his action against the county the law required of him to present his claim to the board, and further required that said board must reject or disallow some part thereof. This the plaintiff failed to show, and hence the ruling of the court in effect nullified that provision of the law.

If the board refused to act, they could be compelled to do so by *mandamus*; but they must act on the claim presented before claimant is authorized to sue the county. The mere fact that the board refuses to act is insufficient. *Price v. County of Sacramento*, 6 Cal. 255; *Fulkerth v. County of Stanislaus*, 67 Cal. 335, 7 Pac. 754; *McCann v. Sierra County*, 7 Cal. 121; *People v. Supervisors*, 28 Cal. 430.

The witness was then asked whether the board of supervisors authorized him to go and summon witnesses outside of the county and territory. The defendant objected on the ground that the records of the board would be the best evidence of what they had authorized him to do,—that the board must speak through their records,—and for the further reason that said board had no right or authority to make any such order or to give plaintiff any such authority. These objections were overruled by the court, and the plaintiff was permitted to testify that the board did give him such authority and promised to pay him mileage.

A deliberate body like the board of supervisors cannot be bound by acts *in pais*, the best and only evidence of its intentions is to be drawn from the record of its proceedings. *Phelan v. San Francisco County*, 6 Cal. 532.

The plaintiff offered in evidence the purported stipulation, signed by plaintiff and the chairman of the board, marked "Exhibit C," and attached to plaintiff's complaint, to which defendant objected as incompetent, and that the same could not bind the defendant, it having been made without legal authority, and that the same was not the act of the board. The board is only the agent of the county, and must pursue

its authority and act within the scope of its power as granted, defined, and limited by the statute. *State v. Harris*, 96 Mo. 29, 8 S. W. 794; *Book v. Earl*, 87 Mo. 246; *Sturgeon v. Hampton*, 88 Mo. 203; *State v. Commissioners*, 18 Neb. 283, 25 N. W. 91; *Walsh v. Rogers*, 15 Neb. 309, 18 N. W. 135.

The board of supervisors has only the powers expressly conferred by law or necessarily implied, and cannot create a debt on the part of the county for any purpose except as provided by law. *Foster v. Coleman*, 10 Cal. 269; *San Joaquin County v. Jones*, 18 Cal. 327; *Linden v. Case*, 46 Cal. 172; *People v. Supervisors El Dorado County*, 11 Cal. 170.

One claiming compensation for services rendered must show a legal contract or a provision for such services. *Moon v. Board of Commissioners*, 97 Ind. 176; *Waymire v. Board of Commissioners*, 105 Ind. 600, 4 N. E. 890.

Boards of supervisors cannot increase the compensation of officers fixed by law. *Foster v. Coleman*, 10 Cal. 279; *People v. Supervisors of El Dorado County*, 11 Cal. 170.

While a public officer must discharge all the duties pertaining to his office for the compensation fixed therefor by law, yet he will not be allowed compensation for extra services, unless so authorized by statute. *Bayha v. Webster County*, 18 Neb. 131, 24 N. W. 457; *State v. Silver*, 9 Neb. 85, 2 N. W. 215.

The services performed by plaintiff outside the territory of Arizona were beyond his jurisdiction; the law makes no provision for payment therefor.

The board of supervisors had no authority to order or authorize him to go beyond his jurisdiction.

Should they undertake to do so, they would exceed the scope of their powers.

Before an officer would be entitled to recover fees from county, he must show, first, that a specific compensation is allowed by law for such services; and second, that express authority exists for paying same. *Waymire v. Powell*, 105 Ind. 600, 4 N. E. 866; *Board v. Gresham*, 101 Ind. 127.

There is no liability for any cause whatever, except such as is created by statute. *Monroe County v. Flint*, 80 Ga. 489, 6 S. E. 173.

The plaintiff charges mileage for serving and attempting to serve subpoenas outside of his county when the same were not indorsed by the district judge, as required by section 2054 of the Criminal Code. The allowance of these charges was error. *Washoe County v. Humboldt County*, 14 Nev. 123.

The plaintiff charges mileage for going to serve process which he failed to serve. Plaintiff is not entitled to any mileage unless he actually executed his process. *Ex parte Wyles*, 1 Denio, 658.

Baldwin & Johnston, for Appellee.

O'Neill's district, for purposes of serving warrants of arrest, was co-extensive with the territory. Pen. Code Ariz. 1887, sec. 1277.

It was his imperative duty to cause the arrest of the defendants anywhere in his district. Pen. Code Ariz. 1887, sec. 227.

The action of the board of supervisors in fixing the salary and the rendering of the services upon the faith of such action constituted a contract to which the sheriff was a party. The consideration therefor, flowing from plaintiff is found in the performance of the services. The county cannot set aside and disregard the contract. *Holmes v. Lucas County*, 53 Iowa, 213; *Mitchell v. Commissioners of Leavenworth County*, 18 Kan. 188.

The mileage provided by statute is not limited to traveling done by an officer within the boundaries of the county or district of which he is such officer. *Cunningham v. San Joaquin County*, 49 Cal. 324; *People v. Pearson*, 3 Scam. 270; *United States v. Sanborn*, 28 Fed. 299; *Mylius St. L. F. and W. R. R.*, 31 Kan. 234.

The sheriff is entitled to mileage for each of five prisoners in removing them from before the magistrate to the county jail. *Sherman v. Santa Barbara County*, 59 Cal. 483.

*United States v. Ralston*, 17 Fed. 899; *Berry v. St. Francois County*, 9 Mo. 213; *Bringolf v. Polk County*, 560; *Harding County v. County of Mtg.*, 55 Iowa, 43, 7 N. W. 396.

A vote of a corporation may be presumed from other acts, though there is no proof of such vote on the corporate record;

for the omission of the corporation to record its own doings cannot prejudice the rights of a party relying upon the good faith of an actual vote of the corporation. *Pixley v. W. P. R. R. Co.*, 33 Cal. 192, 91 Am. Dec. 683; *United States Bank v. Dandridge*, 12 Wheat. 70; *City of Indianola v. James*, 29 Iowa, 282; *City of Davenport v. P. M. and F. I. Co.*, 17 Iowa, 276; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 558, 559; *Gillett v. Commissioners of Lyon County*, 18 Kan. 413.

KIBBEY, J.—This was a suit in the court below by the appellee against the appellant to recover compensation for services alleged to have been performed by him as sheriff of Yavapai County. There was judgment for appellee. The complaint is in two counts,—the first being for a balance alleged to be due for services rendered during the quarter year ending March 31, 1889, and the second for a balance for the quarter ending June 30, 1889. There was a demurrer to each count of the complaint upon the ground that neither of them stated facts sufficient to constitute a cause of action against the defendant. The demurrer to the first count of the complaint was sustained. The demurrer to the second count was overruled; and this ruling is assigned as error, and presents the first question for our consideration.

It is alleged in the second count of the complaint that, during the period beginning April 1, 1889, and ending June 30, 1889, the plaintiff, as sheriff of Yavapai County, performed certain duties imposed upon him by law, the various items of which are enumerated; that on the 24th of August, 1889, he made out a proper account thereof, and a statement of his legal compensation therefor, in form and verified as prescribed by law, and on that day presented such account and claim to the board of supervisors of Yavapai County, the time of presentation being within six months next after the last item in the account had accrued; that by virtue of a contract made between himself and the county, through its board of supervisors, on or about the first day of April, 1889, the appellee performed, and the county agreed to pay for, certain specified services; that certain other services for which he claimed compensation were imposed upon him by law; that, as credits upon certain of the items mentioned in the complaint, the county has paid him sums aggregating \$6,044.85, leaving

unpaid and due the sum of \$3,442.05; that after the presentation of his said accounts and claims, as before mentioned, and before the filing of this complaint, the board of supervisors failed and refused to allow the same, except to the extent of \$6,044.85, and, after the payment of that amount, rejected the residue of his claim; that such account and claims have been presented to the board of supervisors more than one day before their rejection; that the plaintiff has never been indebted to the county; that he has never neglected to make his proper returns and reports as required by law, and has never willfully neglected or refused to perform any of the duties of his office; that heretofore, at the regular April term of said board, the plaintiff presented his account for \$602.60, for certain of the items set out in the complaint; that by mistake and miscalculation he made his claim for that sum, when in fact he was lawfully entitled to the sum of \$997.50; that the plaintiff is dissatisfied with the failure and refusal of the board of supervisors to allow his claim; that the sum of \$5,834.85, paid as credit upon his claim, was paid by the board of supervisors, and received by the plaintiff, upon the express understanding and agreement between the board and the plaintiff that the receipt of said sum should in no wise prejudice or otherwise affect the plaintiff's right to bring his action for the recovery of the balance, and that said credit was received by the plaintiff under protest, and only upon such understanding and agreement. A copy of the agreement referred to is appended to the complaint as an exhibit. It is as follows: "This agreement between the county of Yavapai, through its board of supervisors, acting by its chairman, on the first part, and William O. O'Neill, sheriff of said Yavapai County, in the territory of Arizona, of the second part, witnesseth: That whereas, the bill of the said sheriff for fees and perquisites for the quarter ending July 1, 1889, as presented to the said board of supervisors, is for the sum of \$8,199.15; and whereas, the said board are convinced and satisfied that, under the law, the above sum is too much for the services rendered to the said county, but that the sum of \$5,834.85 is an adequate, reasonable, and liberal allowance to said sheriff under the law: Now, therefore, the said board, acting as aforesaid, hereby agree to draw their warrant and warrants to said sheriff for said last amount with the express

understanding that, should said sheriff be dissatisfied therewith, and bring suit upon said bill to recover the whole thereof, or any sum greater than that allowed, the amount so paid shall be taken as a general credit upon said original bill, and not as an acknowledgment of the justness of each and every item or items thereof, but the legality and justness of each and every item and items of the same shall be determined by and in the courts; and should the final determination of the courts be and find that the said sum so allowed by the board be more than the law allows for said services, then the said county is to have a credit for such difference. And the said sheriff, on his part, agrees to and accepts the above proposition with all of its conditions, and further agrees to take no advantage of said payments, but to litigate the same as a whole, and regardless of said payment, testing each and every item of the same. It is further understood that the receipt of such said sum is no bar to any action, and shall in no way or manner lessen the rights of the said sheriff in any proceeding that he may hereafter bring against said county of Yavapai upon said account." Section 578 of the Revised Statutes of 1887 (sec. 1, ch. 14, tit. 13, "Counties") provides that "accounts for county charges of every description must be presented to the board of supervisors to be audited as prescribed in the act." Section 579, among other things, provides that the compensation of the sheriff for executing process in criminal cases is a county charge, and so "the expenses necessarily incurred in the support of persons" committed to jail. Section 408 provides that every person having a claim against the county, except for compensation due to jurors and witnesses, or for official salaries, by which some express provision of law is made a demand against the county, shall, within six months after the last item of the account accrued, present a demand therefor, in writing, to the board of supervisors of the county against which such claim or demand is held, verified by the affidavit of himself or agent, stating minutely what the claim is for, and specifying each several item, and the date and the amount thereof. Section 414 provides that "where the board [of supervisors] finds that any claim presented is not payable by the county, or is not a proper county charge, it must be rejected. If they find it to be a proper county charge, but greater



in amount than is justly due, the board may allow the claim in part, and draw a warrant for the portion allowed, on the claimant signing a receipt in full for his account. If the claimant is unwilling to receive such amount in full payment, the claim may be again considered at the next regular succeeding session of the board, but not afterwards." Section 415 provides that "a claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterwards."

It will be observed that the plaintiff in this case had presented his claim for the items embraced in his complaint (except as modified to correct an alleged error in a former account) to the proper board of supervisors; that his claim had been by it considered, and allowed for a sum less than the amount claimed by him; and that he had, before this suit was begun, received warrants for the amount so allowed. The question presented by the demurrer devolves upon us the consideration of the legal effect of the agreement between the board of supervisors and the appellee, whereby he received the sum allowed by the board upon the understanding (and the board expressly agree) that such payment should not operate to affect appellee's right to litigate the whole claim. Preliminary to that, however, is the question whether the method prescribed by the act we have quoted from for the allowance and enforcement of claims against the county is exclusive, or whether a claimant may not, in the first instance, sue the county, without resort to the method prescribed. In many states it is expressly provided by statute that actions against municipal or *quasi* municipal corporations, upon any demand whatsoever, cannot be maintained until the claim therefor shall have been presented to the proper officer of the corporation charged with the duty of auditing and allowing claims for allowance or rejection. In our statute there is no such express limitation of the right to maintain an action against the county. By section 384 a county may sue or be sued. The fifth clause of section 522 (of the same title) provides that the county treasurer shall "disburse the county moneys only on county warrants issued by the board of super-

visors, signed by the chairman and clerk of said board, or as provided by law." Section 407 provides that "no payment shall hereafter be made from the treasury of any of the counties of this territory unless the claim or demand shall be duly allowed according to the provisions of this act." Construing these several statutory provisions together, we think it a fair inference that the legislature intended that the presentation of every claim against the county to the board of supervisors for its action should be a condition precedent to the maintenance by the claimant of an action thereon; that the remedy so prescribed for the establishment and enforcement of claims for money against a county is exclusive. Upon that part of the claim, then, embodied in the complaint, which includes items that were not presented to the board, and which plaintiff alleges were omitted by mistake, applying the above rule, there can be no recovery. That manner of the presentation, allowance, and payment of claims against the county prescribed by the statute from which we have quoted, being exclusive of any other, the right of the plaintiff to maintain this action is governed thereby, and, as well, is the board of supervisors.

It is a salutary rule that requires the claimant, if he be dissatisfied with the allowance by the board, to either forego its part rejected, or submit his claim as a whole to the courts. It would be unfair to the county that he should accept that part of the determination of the board that is to his advantage, and make the other a subject of litigation. The observance of the rule that, when his claim is only partially allowed, the claimant must accept the part so allowed in satisfaction of his whole claim, or litigate it as an entirety, would directly tend to the discouragement of the presentation of fictitious and extortionate claims against the county. It is expressly provided that the board shall draw its warrant for the portion allowed upon the claimant filing a receipt in full for his account. This is necessarily, by construction, prohibitive of the issuance of the warrant upon any other condition; and of this the plaintiff must have been as well aware as was the board of supervisors, and the effect of the receipt by the plaintiff was to release the county for further liability. The board of supervisors had, in the premises, only such powers

as were expressly conferred upon them, and those necessarily implied from those expressed. It not only had not power conferred upon it to waive this condition, but that power was distinctly withheld; and, moreover, the alleged agreement upon the part of the board is wholly without consideration. If any illegal payments had been made, they could, under other provisions of the statute, have been recovered; and the agreement of the appellee that the county should not be bound by its order of allowance, and that he would take no advantage of it, gave to the county no right which it did not already have by statute. Rev. Stats., sec. 383, same title. It follows, therefore, that the agreement between the board of supervisors and the plaintiff, providing that the acceptance by plaintiff of the warrant for a part of his claim should not operate to affect the plaintiff's right to proceed by suit to establish his whole claim, is void, and for that reason the demurrer should have been sustained.

While this conclusion requires us to reverse the case without consideration of the other questions presented, yet, as it is known to each of the members of this court sitting as district judges, that questions are constantly arising concerning the compensation of sheriffs, we shall consider those presented by this record. The first item objected to is one for \$678, for mileage for 2,260 miles' travel to serve warrants of arrest. The plaintiff was allowed to testify that, when he first received notification of the robbery alleged to have been committed by the men in the accomplishment of whose arrest he alleges he necessarily traveled 2,260 miles, he went to the district attorney of the county, and to Mr. Behan, the chairman of the board of supervisors, and told them he was going after the train robbers,—those subsequently arrested; that Mr. Behan declined to let him take the proper deputies; that Mr. Ross, the district attorney, was non-committal, but said that the A. and P. R. R. would pay for the capture; that he thereafter began a pursuit of the alleged robbers, finally effecting their arrest in Utah, whence he returned them to Prescott, the county-seat of Yavapai County, Arizona. Other testimony relative to the difficult character of the country traversed in effecting the capture, the manner of the capture, and the dangers encountered therein was permitted, but it is not material

to the consideration of the question. Of the 2,260 miles alleged to have been necessarily traveled in effecting this arrest a considerable proportion was in Utah. It appears that the plaintiff had in his hands a warrant for the arrest of the train robbers, issued by a justice of the peace of Yavapai County, and that it was upon this warrant that he assumed to make the arrest. Section 1972 of the Revised Statutes of 1887 (title "Fees and Salaries") fixes the fees of a sheriff for executing a warrant of arrest or *capias*, or making an arrest without warrant, at two dollars. For each mile he may be compelled to travel in executing criminal process, summoning or attaching witnesses, thirty cents, to be charged one way only. By section 1277 of the Penal Code it is provided that "a warrant may be directed generally to any sheriff, constable, marshal, or policeman in this territory, and may be executed by any of those officers to whom it may be delivered in any county." This section confers upon the sheriff, or other officer in whose hands the warrant may be, the power to execute it anywhere within the territory; but of course the warrant would have no extraterritorial vitality. The statute prescribes a fee for executing the writ, and mileage for the distance necessarily traveled in executing it. To execute a warrant of arrest is to actually effect the arrest by virtue of and in obedience of the mandate of the writ, and make of the person therein named the disposition required. A warrant of arrest issued out of any court in this territory cannot be executed in a legal sense outside of the territory. Whatever was done in Utah in the way of pursuit and capture was not there done, and could not there be done, in the execution of the writ, for there the writ was not a writ. It is our conclusion, then, that no fee can be, under the statute, charged for travel beyond the territory, in the execution of a warrant of arrest; and to the extent that such fees were allowed, the judgment of the lower court is erroneous. Whether the board of supervisors could make a valid agreement to pay compensation for such services we need not here decide. It is sufficient to say, for the purpose of this case, that it did not do so. The chairman of the board, by virtue of his office, cannot bind the county, nor can the district attorney.

The next item for our consideration is one for \$1,115.10, for

services and mileage in the service of certain subpoenas. The plaintiff was allowed to testify, over the objection of the appellee, that the board of supervisors authorized him to go and serve these subpoenas. This was error. The statute requires that the clerk of the board must record all proceedings of the board, and make full entries of all their resolutions and decisions on all questions concerning the raising of money, and for the allowance of accounts against the county. Rev. Stats., 1887, sec. 394. The succeeding section provides that the board must cause such a record to be kept. It will be presumed that the board and its clerk have done their duty in this particular, and if the board made such an order, or gave such authority, that there is a record of it; and the record, if there be one, is the best and only evidence of the fact. We are aware that there is some conflict of authority on the question of the admissibility of parol evidence, or other evidence than that of the record itself required by statute of proceedings of county boards, to prove the acts of such boards. A few have held that the board can only speak by its records; others hold that omissions from the record may be supplied by parol evidence; and still others that parol evidence is of equal degree with the record. The extent, however, to which it is here necessary to go is that, when there is a record of the proceedings of the board,—and it will be presumed, in the absence of a showing to the contrary, that there is one,—parol evidence is not competent to prove the action of the board of supervisors. Of the item for \$1,115.10, a large proportion is for mileage for travel outside of the territory. That part of the charge would not, in the absence of an agreement by the board of supervisors otherwise, be a proper charge against the county. It appears, by the minutes of the board of supervisors, that it took the following action: "On motion it was ordered that the sheriff be allowed mileage to subpoena witnesses in Utah in the cases of the train robbers." The question, then, presents itself as to the power of the board of supervisors to make such an order. It is of course true, as elsewhere said, that the writs of the several courts of this territory can have no legal effect outside of our territorial limits. It is among the functions of a county government to aid the local courts in the administration of

justice; to that end to provide court-houses for the courts, and light, fuel, and attendance thereon; to supply proper books and stationery; to provide money for the payment of officers for summoning witnesses, and the arrest of criminals. In the exercise of this function the board of supervisors are circumscribed by statutory provisions on these subjects, where there are such provisions. It may often happen that the attendance of witnesses of great importance resident out of the jurisdiction of any of the courts of the territory may be secured at those courts upon mere notification to them of the fact that their attendance is requested. It appears in the train-robber cases, spoken of in this record, that witnesses not resident of the territory did appear after the notice to them that their attendance was desired. Their absence might have prevented the conviction of those train robbers. There is no express provision in the statute for the compensation of the sheriff for going out of the territory upon such service; but clause 9 of section 579 provides that the contingent expenses necessarily incurred for the use and benefit of the county shall be a county charge. To hold that the board of supervisors may not employ some one to notify such non-resident witnesses, and thereby secure their attendance when it could not otherwise have been secured, will in many cases result in the defeat of the very purpose of the organization of courts. We think that the board has the power, acting, of course, reasonably, and in the exercise of a careful discretion, to employ the necessary means to secure the attendance of necessary witnesses who cannot be secured by the ordinary process of the court. The sheriff, in such a case, acts not as sheriff, but as a mere messenger; and we think, if he was actually employed in that service, he is entitled to the compensation agreed upon, if any be agreed upon, between himself and the board of supervisors. If none was agreed upon, then he would be entitled to reasonable compensation, to be fixed by the court in the event of a suit. We think the minute entry in the record of the proceedings of the board is sufficient evidence of such employment.

The next error complained of by appellant is that the court permitted a witness for the plaintiff to testify to the contents of certain telegrams relative to the whereabouts of an alleged

criminal. This was erroneous, for two reasons: The proper foundation was not laid for the admission of parol evidence of the contents of a telegram; and because communications between a sheriff and a third person are incompetent to establish or tend to establish an agreement between the sheriff and the board of supervisors relative to the subject-matter of such communications.

Among the items charged by the plaintiff in his account, as sheriff, against the county, are several for removing a prisoner from the place of arrest to the county jail, as well as for mileage from the county-seat to the place of arrest. The statute provides compensation "for removing a prisoner, for each mile necessarily traveled, to be charged one way only [thirty cents,] and for each guard the same. Insane persons are prisoners within the meaning of this act. For each mile he may be compelled to travel in executing criminal process, summoning or attaching witnesses, to be charged one way only, 30 cents." Rev. Stats. Ariz. 1887, par. 1972. To execute criminal process, as we have before said, is to do what is in the writ commanded. A warrant of arrest in the form prescribed by our Penal Code not only commands the arrest, but the bringing of the prisoner to the place of holding the court whence the warrant issued. To execute, therefore, a warrant, the officer must not only arrest, but "remove" the prisoner from the place of arrest to the court whence the writ issued. For this particular service, that is, for arresting the prisoner and removing him thence to the place named in the writ, the statute provides a compensation of thirty cents per mile necessarily traveled, one way only. It seems to us that the contention of plaintiff, that his compensation for executing such process is earned when he shall have effected the arrest merely is not tenable; the removal of the prisoner is a part, in such case, of the execution of the writ. There are many cases where a prisoner may be removed, as from the territorial prison to the county-seat on a reversal of a judgment of a district court; the removal from a magistrate's court to the county jail after a preliminary examination; upon the order of a committing magistrate after trial or upon a commitment; upon a change of venue, etc.,—and it is compensation for these removals that the statute contemplates, and not

the removal of a prisoner from the place of arrest to the county-seat. The case of *Sherman v. Santa Barbara Co.*, 59 Cal. 483, cited by appellee, is not in point; the case of *Cunningham v. San Joaquin Co.*, 49 Cal. 323, is based upon a statute differing from ours, rendering it inapplicable to the question before us; and we do not think that the language used in the third clause of section 579 of the Revised Statutes of 1887 will warrant the construction put upon the fee-bill by the court below. The whole object of section 579 is to make the sheriff's legal compensation and expenses, elsewhere fixed, in criminal cases, a county charge. For the arrest of a prisoner, and removing him to the court whence the warrant issued, the only compensation to be allowed to the sheriff is two dollars for the service of the writ, and thirty cents for each mile, counting one way only, necessarily traveled in effecting such arrest and removal. In addition to that,—not by way of compensation, however, but as necessary expense incurred by him,—the sheriff, or other officer, effecting the arrest and removal, is entitled to be reimbursed the amount of expenses incurred by him in returning his prisoner, or for transportation of the prisoner, and his subsistence, excluding of course, in the estimate of expense, any part of the personal expense of the officer.

Another objection to the account is that among the items charged by appellee are several for mileage traveled outside of Yavapai County to serve subpoenas in criminal cases upon which there had not been indorsed the order of the judge of the district court that the witness named in the writ should attend, under the provision of section 2054 of the Penal Code. That section provides that a witness in a criminal case, non-resident of the county in which the case is to be tried, shall not be obliged to attend unless an order to that effect shall have been indorsed by the judge of the court upon the subpoena, requiring such attendance. Until such an order shall have been indorsed, the writ lacks its chief, essential element,—that is, the positive command of the court for attendance, for the violation of which the witness may be subjected to penalties. It is practically not a subpoena, and is ineffectual to accomplish the purpose of such a writ without the indorsement so required. We are of the opinion that the sheriff was not



bound to serve a writ of subpoena in a criminal case upon a witness non-resident of the county where the trial is to be had unless it be so indorsed; that its service is not contemplated by the statute; and, consequently, no fee can be allowed therefor as a legal county charge.

Other items charged, which are objected to, are for mileage traveled in unsuccessful attempts to execute warrants of arrest. We think it very clear that fees for mileage cannot be allowed unless the officer shall have executed the writ. The statute provides that for each mile necessarily traveled in executing the process there shall be allowed thirty cents, to be charged one way only. Par. 1972. The case of *Davis v. Board*, 37 Minn. 491, 35 N. W. 365, is relied on by appellee to warrant a contrary construction of the statute. That case, however, turns upon a provision of the Minnesota statute that does not appear in our statute; and even then the reasoning of that case is not satisfactory. The rule we have announced we think better calculated to serve public interests by exciting officers to diligence and promptness in the service of criminal process. These items, therefore, are not proper county charges. The judgment of the court below will be reversed, and this cause remanded, with instruction to sustain the demurrer to the complaint, and take other proceedings in accordance with this opinion.

Sloan, J., concurs in the foregoing opinion.

WELLS, J.—I concur, except to that part of the opinion which holds that an officer having a warrant of arrest cannot receive mileage traveled in unsuccessful attempts to execute such warrant. I hold that the officer should receive, by way of compensation, such mileage actually traveled as is reasonable, where an honest effort is made to serve the process, although he failed to make the arrest, or return the prisoner.

GOODING, C. J.—I concur in the decision, and in the opinion, except that part of the opinion that recognizes authority in the board of supervisors to send an agent or messenger out of the territory to procure the attendance of witnesses, and to make a contract binding the county for the

expense thereof; except, also, that part of the opinion that holds a sheriff not entitled to compensation unless he actually arrests a prisoner for whom he may have a writ or warrant. On these two propositions I dissent.

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[Civil No. 303. Filed January 30, 1892.]

[29 Pac. 652.]

GEORGE H. BOGAN et al., Plaintiffs and Appellants, v.  
SALVATOR PIGNATARO, Defendant and Appellee.

**1. APPEAL AND ERROR—WHAT APPEALABLE—FINAL JUDGMENTS—ORDER DISSOLVING TEMPORARY INJUNCTION—HISTORY Co. v. DOUGHERTY, POST, p. 387, 29 PAC. 649, CITED AND APPROVED.**—This court has jurisdiction on appeals from final judgments, citing *History Co. v. Dougherty, supra*. This court has no jurisdiction of an appeal from an order dissolving a temporary injunction; it not being a final judgment.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge. Dismissed.

The facts are stated in the opinion.

Barnes & Martin, for Appellants.

F. J. Heney, for Appellee.

PER CURIAM.—This is an appeal from an order of the court below, dissolving a temporary restraining order. In the case of *History Co. v. Dougherty, post*, p. 387, 29 Pac. 649, (decided at this term,) we held that this court has appellate jurisdiction in appeals from final judgments. The order here appealed from is not a final judgment; hence this court has no jurisdiction, and the appeal is dismissed.

Sloan, J., not sitting.

[Civil No. 275. Filed January 30, 1892.]

[29 Pac. 385.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,  
v. ZAN L. TIDBALL et al., Defendants and Appellees.

1. **APPEAL AND ERROR—RECORD—ASSIGNMENTS OF ERROR—FAILURE TO FILE—REV. STATS. ARIZ. 1887, PAR. 940, CONSTRUED AND HELD MANDATORY.**—Paragraph 940, *supra*, providing that the appellant shall file with the clerk of the court below an assignment of errors before he takes the transcript of the record from the clerk's office, is mandatory. An assignment of errors not so filed will not be considered as in the record.
2. **PLEADING—SET-OFF AND COUNTERCLAIM—ACCOUNT—NECESSITY FOR PLEADING ITEMS—REV. STATS. ARIZ. 1887, PAR. 737, CONSTRUED.**—Under statute, *supra*, providing that "the plea setting up such counterclaims shall state distinctly the nature and several items thereof, and shall conform to the ordinary rules of pleading," no greater degree of particularity is required in setting forth the nature and various items of a claim when pleaded by way of set-off than when pleaded in a complaint.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. William H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Harry R. Jeffords, United States District Attorney, for the United States.

J. A. Zabriskie, Barnes & Martin, and Baker & Campbell, for Appellees.

PER CURIAM.—It appears from the certificate of the clerk of the district court, indorsed thereon, that the transcript filed in this case was on demand handed to the United States attorney for Arizona, and by him taken from the clerk's office on the 9th of September, 1889. The transcript, as delivered, contained no assignment of errors, and it also appears from the clerk's certificate that none had previously been filed. The United States attorney attempted to

supply the omission by filing with said district clerk an assignment of errors, on the thirty-first day of December, more than three months after delivery of the transcript. This assignment has been affixed to the transcript, with the clerk's certificate as to its filing in the court below. In paragraph 940 of the Revised Statutes it is provided that "the appellant or plaintiff in error shall in all cases file with the clerk of the court below an assignment of errors, distinctly specifying the ground on which he relies, before he takes the transcript of the record from the clerk's office, and a copy of such assignment of errors shall be attached to and form part of the record, and all errors not so distinctly specified shall be considered by the supreme court as waived." This court has not heretofore had occasion to pass upon the effect of a failure to file an assignment of errors as required by this statute. The statute is mandatory in its terms, and contains no exceptions. Apart, however, from the positive requirement of the statute, a consideration of the proper function of an assignment of errors, as well as the evident purpose in requiring its filing in the court below before the transcript is finally made up and delivered, leads us to the conclusion that, if it be not so filed, the omission may not be cured by a subsequent filing. An assignment of errors is designed to apprise not only the appellate court, but also the appellee or defendant in error, of the precise grounds of appeal, and in this it sustains much the same relation in the appellate court as that of the complaint in the court below. The requirement that it be filed with the clerk below is a wise one, if for no other reason than that it gives to the appellee or defendant in error an opportunity for its inspection before the transcript is finally completed and given to the appellant or plaintiff in error. We hold, therefore, that the provision of the statute requiring an assignment of errors to be filed with the clerk below before the delivery of the transcript must be strictly complied with, and, if not so filed, will not be considered as in the record.

This is a suit on a bond given by Zan L. Tidball to the United States as United States marshal for the territory of Arizona, and is brought by the United States against said Tidball and the sureties on said bond to recover the sum of \$21,950.37, a balance alleged by the United States to be due

it on account of moneys placed in the hands of said Tidball as marshal for which he has failed to account. Appellees in their answer pleaded by way of set-off, and set up that, at and before the commencement of the action, the United States was indebted to said Tidball in the sum of twenty-two thousand dollars. They averred that of said amount of indebtedness the sum of twenty-one thousand dollars was due said Tidball on account of moneys advanced, and by him paid out for fees and expenses of marshal at the instance and request, and for the use and benefit, of the United States; that in like manner, and during said time, the sum of one thousand dollars of said indebtedness was due on account of miscellaneous expenses advanced and paid out by said Tidball at the instance and request, and for the use and benefit, of the said United States. They further averred that said Tidball, prior to the commencement of the action, had duly presented to the proper accounting officers of the treasury department a full statement of his said claim and account for allowance, accompanied with proper vouchers for all therefor, and that the whole thereof had been by said accounting officers disallowed upon said presentation. Appellant demurred to this answer and set-off, upon the ground that it did not state facts sufficient to constitute it a good defense to appellant's cause of action. The demurrer was by the court overruled. This ruling of the court, in the absence of an assignment of error, presents the only question for our consideration in the record. In the brief of counsel for appellant it is urged that this ruling of the court was error, and in support of this we are cited paragraph 737 of the Revised Statutes, which reads as follows: "The plea setting up such counterclaims shall state distinctly the nature and several items thereof, and shall conform to the ordinary rules of pleading." We do not understand that this statute requires any greater degree of particularity in setting forth the nature and various items constituting a claim pleaded by way of set-off than when pleaded in a complaint in an action based upon such claim. Both pleadings must alike, in their particulars, "conform to the ordinary rules of pleading." We think, if the same facts were set up in a complaint, they would, upon demurrer, properly be held to be sufficient statement of the cause of action. The evident na-

ture of Tidball's claim, made up, as it was, of numerous items, would, we think, relieve the pleader from the necessity of greater particularity than that stated. A bill of particulars would have afforded appellant such specific information as he desired if asked for, and would doubtless have been allowed. We therefore see no error in the ruling of the court upon the demurrer. The judgment of the court below is affirmed.

Gooding, C. J., Sloan, J., Kibbey, J., and Wells, J., concur.

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[Civil No. 279. Filed January 30, 1892.]

[29 Pac. 649.]

THE HISTORY COMPANY, a Corporation, Plaintiff and Appellant, v. J. W. DOUGHERTY, Defendant and Appellee.

1. APPEAL AND ERROR—JURISDICTION—STATUTORY CONSTRUCTION—FINAL JUDGMENTS—AMOUNT IN CONTROVERSY—REV. STATS. U. S., 1878, SEC. 1869, CONSTRUED, SEC. 1874 CONSTRUED, SEC. 1910 CITED, SEC. 1865 CITED, TITLE 23 CITED; SUPP. REV. STATS. U. S. 1891, P. 893, SEC. 5, CH. 131, CITED; REV. STATS. ARIZ. 1887, PARS. 592, 593, 846 CONSTRUED; PARS. 3275, 3276, 3280 CITED; COMP. LAWS ARIZ. 1877, SECS. 2339, 2340, CITED—BISHOP V. PERRIN, ANTE, P. 350, 29 PAC. 648, CITED AND APPROVED.—Section 1869, Rev. Stats. U. S., providing that "writs of error, bills of exceptions, and appeals shall be allowed from the final decisions of the district courts to the supreme courts of all the territories, respectively, under such regulations as may be provided by law," refers only to "district courts" created by the organic act, which are those vested with the same jurisdiction in certain cases as the circuit and district courts of the United States. It does not refer to territorial district courts established under sec. 1874, Rev. Stats. U. S., which have their existence by virtue of the acts of the territorial legislature. Their jurisdiction and the right and the manner of appeal from their judgments are defined solely by the legislature. Paragraphs 846, 592, and 593, Rev. Stats. Ariz. 1887, sections of the same code defining jurisdiction on appeals are irreconcilable. Where a commission for the revision of a code has been appointed by the legislature the entire code pertaining to a particular subject will be construed as adopted and approved the same day though in fact

approved at different times. In such revision where paragraph 846 gives the right of appeal in all cases, and paragraph 592 limits the right, the construction will be in favor of the enlarged rather than the limited right, and, therefore, an appeal from the final judgment of the district court in all cases will be allowed. Upon such appeal the matters to be reviewed are to be governed by paragraph 593.

2. **FRAUD—REPRESENTATIONS AS TO EXISTING INTENT TO DO ACTS IN FUTURE.**—Fraud cannot be predicated upon a representation of an existing intent thereafter to do or not to do a particular thing.
3. **SAME—PLEADING—CONCLUSIONS OF LAW.**—An answer to a complaint alleging a written contract for the purchase of certain books, setting up that the defendant made an oral agreement with plaintiff's agent, and that immediately thereupon, the agent fraudulently substituted a written memorandum expressing an entirely different contract, is subject to demurrer. The application of the epithet "fraudulent" to the transaction is not a sufficient allegation of fraud. Facts showing fraud must be alleged.
4. **CONTRACTS—DUTY TO READ—SIGNATURE BINDING IN ABSENCE OF FRAUD.**—A person of ordinary intelligence is bound to know the contents and nature of an instrument he signs, unless imposed upon by some fraudulent device in the securing of his signature.
5. **EVIDENCE—RELEVANCY.**—In an action upon a written contract, ordering thirty-nine books, evidence that at the time of the order the agent was only soliciting subscriptions for the entire thirty-nine volumes was irrelevant.

**APPEAL** from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James W. Wright, Judge. Reversed.

The facts are stated in the opinion.

Ross & Van Horn, for Appellant.

A mere allegation of fraud is insufficient. Facts constituting fraud must be specifically alleged and proved.

That the agent "forthwith did substitute" the writing sued on for the oral contract, means nothing more than that he asked the defendant to witness by his signature the contract just made. His signature was to a writing "which serves as a proof of the obligation." It is not a substitution for the contract, but is the evidence of the contract.

Actual fraud in securing defendant's signature would avoid

the contract. But while the defense charges "fraud," "intent to circumvent," and the like, no allegation is made of facts sufficient to maintain fraud. *Tepoel v. Bank*, 24 Neb. 815, 40 N. W. 415; *Hazard v. Griswold*, 21 Fed. 178.

Granting that the oral contract was for one book only, that the agent "did forthwith present" to defendant "for his signature a certain other and different contract," was not fraudulent unless, the defendant being unable to read, the contract was misread to him, or its contents misrepresented to him by some one in whom he had the right to repose confidence. This he fails to allege, or even to allege that the agent made any misrepresentation, or did anything by word, act, or silence to induce him to believe it was a contract for one book only, or to indicate its contents, or to prevent his reading it. Nor does he say that he had no opportunity to read the contract, or that any device, artifice, or trick was resorted to to prevent his reading it. Nor does he claim to have relied on word or act on the part of the agent as to the contents of the contract, but solely and simply upon his impression. Neither does he make showing of any fiduciary relation, or of right to repose confidence in the agent as *his* agent, friend, or principal. Neither does he allege that the enforcement of the contract will work him any injury. The authorities are that a person is bound to know the contents of a contract or instrument he signs, unless he can bring himself within one of the exceptions just noticed. *Penny v. Jackson*, 85 Ala. 67, 4 South. 720; *Barnes v. Mahannah*, 39 Kan. 87, 17 Pac. 319; *Metropolitan etc. Co. v. Esche*, 75 Cal. 513, 17 Pac. 675; *McKinney v. Herrick*, 66 Iowa, 414, 23 N. W. 767; *Wallace v. Chicago etc. Ry. Co.*, 67 Iowa, 547, 25 N. W. 772; *Taylor v. Fleckenstein*, 30 Fed. 99; *Bell v. Ryerson*, 11 Iowa, 233, 77 Am. Dec. 142; *Ward v. Packard*, 18 Cal. 392; *Morrison v. Lods*, 39 Cal. 381; *McEwan v. Ortman*, 34 Mich. 325; *Murrell v. Murrell*, 2 Strob. Eq. 148, 49 Am. Dec. 664; *Hawkins v. Hawkins*, 50 Cal. 558; *Parsons on Contracts*, 773; *Bigelow on Fraud*, 525; *Story's Equity Jurisprudence*, 191; *Kerr on Fraud and Misrepresentation*, 84.

For cases *totidem pedibus* with the case at bar, see, *Hazard v. Griswold*, 21 Fed. 178, and *McCormick v. Molburg*, 43 Iowa, 561.



The burden of proof is on the defendant to establish the facts constituting fraud. *Wallace v. Mattice*, 118 Ind. 59, 20 N. E. 497; *Towsy v. Shook*, 3 Blackf. 267, 25 Am. Dec. 108; *Nichols v. Patten*, 18 Me. 231, 36 Am. Dec. 713; *Bartlett v. Blake*, 37 Me. 124, 58 Am. Dec. 775; *Bunch v. Smith*, 15 Tex. 219, 65 Am. Dec. 159; *Martin v. Foster*, 83 Ala. 213, 3 South. 422; *Moses v. Katzenberger*, 84 Ala. 95, 4 South. 237.

And as against the contract and the supporting evidence of the agent there must be more than defendant's evidence alone. *Jones v. Degge*, 84 Va. 685, 5 S. E. 799.

And where the matter is in doubt the presumption raised by the contract must prevail in its favor. *Martin v. Foster*, 83 Ala. 213, 3 South. 422.

The written contract supported by the testimony of the agent is conclusive unless contradicted by two witnesses or their equivalent. *Sylvius v. Kosek*, 117 Pa. St. 67, 2 Am. St. Rep. 645, 11 Atl. 392.

The usual rule that a verdict will not be set aside unless clearly wrong does not apply here strictly; for in this case the law has settled well and thoroughly what shall be considered sufficient proof. *Jones v. Degge*, *Martin v. Foster*, *Sylvius v. Kosek*, *supra*.

Baldwin & Johnston, for Appellee.

The jury are the sole and exclusive judges of the evidence, the weight of evidence and the credibility of the witnesses, and, where the evidence is conflicting, their solution of the problem of truth or falsity, is, within that sphere, conclusive. *Stampofsi v. Steffens*, 79 Ill. 303.

The cases cited by the appellant express the doctrine that where the makers of a written contract agree that the *writing itself* shall express the contract between the makers, then the makers, being thus put upon guard, are bound by the terms of the writing, in the absence of fraud. Where it is mutually agreed and understood that the *writing itself* shall express the concurrent minds and wishes of the contractors, the attention of the signers of the written contract is directed specially to and fixed upon the contents of the writing, and they look to and *read* the *written* contract for the purpose of seeing that it correctly expresses their intentions. The rule is radi-

cally different in all those cases where the minds of the contractors meet and agree through the agency of *spoken* language, and thereupon one of the parties purports to reduce the *verbal* contract to *writing*, but fraudulently misrepresents in writing the verbal agreement. In the latter instance one of the contractors may, without negligence, repose confidence in the honesty of the other who writes the contract. *Briggs v. Missouri*, 51 Mo. 249, 11 Am. Rep. 245, and note; *Albany City Savings Institution v. Burdick*, 87 N. Y. 44; *Cole Brothers v. Williams*, 12 Neb. 440; *Griffiths v. Kellogg*, 39 Wis. 290, 20 Am. Rep. 48; *Whittaker v. Miller*, 83 Ill. 383; *Barlow v. Scott*, 24 N. Y. 42; *Puffer v. Smith*, 57 Ill. 527; *Trambley v. Record*, 130 Mass. 259; *Taylor v. Atchison*, 54 Ill. 199, 5 Am. Rep. 118; *Watt v. Powers*, 20 Mich. 429, 7 Am. Rep. 661, and note; *Gibbs v. Linbury*, 22 Mich. 488, 7 Am. Rep. 675.

KIBBEY, J.—This was a suit in the court below upon an alleged contract of purchase by the appellee from the appellant of a complete set of the literary works of Hubert Howe Bancroft, then in the course of publication by appellant. The price alleged to have been agreed upon, and which was sued for in this suit, was \$170.50. There was judgment for the appellee in the court below.

It is objected to our consideration of this appeal that this court has not jurisdiction, because the judgment appealed from is not one from which an appeal is allowed, in that the "matter in dispute" does not exceed two hundred dollars. The several statutory provisions bearing upon the question of appeals to this court are as follows: Section 1869 of the Revised Statutes of the United States, (of our organic act) is: "Writs of error, bills of exceptions, and appeals shall be allowed from the final decisions of the district courts to the supreme court of all the territories, respectively, under such regulations as may be prescribed by law." Section 592, Revised Statutes of Arizona, 1887, is: "The supreme court shall have appellate jurisdiction in all cases where the matter in dispute exceeds one hundred dollars, where the legality of any tax, toll, or impost, or municipal fine is in question, and in all criminal cases amounting to felony, or on questions of law alone." Section 593 provides that "the supreme court shall have juris-

diction to review upon appeal, or other proceedings provided by law, (1) a judgment in an action or proceeding commenced in the district courts, when the matter in dispute exceeds two hundred dollars, or when the possession of tenements or land is in controversy, or brought into that court from another court, and to review upon appeal from such judgment, any intermediate order involving the merits, and necessarily affecting the judgment; (2) an order granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or proceeding." The foregoing sections (592 and 593) are parts of title 14, approved March 10, 1887. Section 846, Revised Statutes of Arizona, 1887, is: "An appeal or writ of error may be taken to the supreme court from any final judgment of the district court rendered in civil cases." Section 846 is a part of title 15, but was approved February 14, 1887. A comparison of these several statutory provisions discloses an irreconcilable conflict. Section 1869 of our organic act, we think, refers only to "district courts" which are mentioned in and created by that act itself, and not to courts established under the provisions of section 1874 of the organic act, as are our several district courts in, of, and for the several counties. The "district courts" created by the organic act are those vested with the same jurisdiction in certain cases as is vested in the circuit and district courts of the United States, (see sec. 1910, organic act,) and which under the provisions of section 1865 of the Revised Statutes of the United States, and of the act of Congress of 1891, (sec. 5, ch. 131, Supp. Rev. Stats. U. S., p. 893,) hold two terms annually at such places within such district as may be designated by the chief justice and his associates. This appeal is from the district court of the third judicial district in and for the county of Yavapai. No such court is created by our organic act. It has its existence by the act of the legislative assembly of the territory, and its jurisdiction, and as well the right and the manner of appeal from its judgments, are defined solely by the legislature. Section 1869 of the organic act, therefore, has no application to this particular appeal; and resort can alone be had to our own legislative enactments on the subjects, to determine the right of appeal in this case. We are aware that the organic act of Arizona does not ex-

pressly provide for district courts; but the supreme court of the United States, in the case of *Lothrop*, 118 U. S. 113, 6 Sup. Ct. Rep. 984, practically holds that the district courts created by title 23 of the Revised Statutes of the United States do exist here. It will be noted that section 846, which provides for appeals generally, without regard to the character of the action, in which the judgment appealed from is rendered, was approved February 14, 1887; that is, before the enactment of sections 592 and 593. The provisions of sections 846 and of 592 and 593, are irreconcilable, and the provisions of sections 592 and 593 are repugnant. Ordinarily the rules of statutory construction would require us to give effect to the latest enactment of the legislature; that being its last expression of its intention, and hence to prevail. Applying this rule the provisions of section 846 must give way to those of sections 592 and 593. But, as we have noted, the provisions of sections 592 and 593 are repugnant to each other, and they are parts of the same act of the legislature. The several parts of the Revised Statutes of 1887 were compiled by a commission appointed for that purpose under the provisions of an act of the territorial legislature approved January 17, 1887. That commission was authorized to revise the laws of this territory, eliminating therefrom all crude, useless, imperfect, and contradictory matter, and inserting such new provisions as they may deem necessary and proper. Rev. Stats. Ariz. 1887, sec. 3275. The commission was required by the same act to report, as soon as they may have been prepared, laws on any particular subject. Id., sec. 3276. The commission was authorized to remain in session after the adjournment of the legislative session to prepare the Revised Laws for publication. Id., sec. 3280. Pursuant to these provisions the commission met, and proceeded to the discharge of their duties. They reported from time to time, as they were prepared, the several parts of the Revised Statutes, and they were generally approved by the legislature in the order of their presentation. Nothing appears in the Revision itself, nor in the provisions authorizing it, to indicate that any part should take precedence over any other, from the mere accident that all were not simultaneously expressed as the will of the legislature. On the other hand, we think it fair to presume that it was the intention of

the legislature, by its very act of appointing the revision commission, that the result, as finally completed, should constitute one continuous, consistent, homogeneous, simultaneous compilation of our statutory law. For the purpose of construction, at least, where it is not otherwise provided, we may consider the entire code pertaining to the establishment of courts, the definition of their jurisdiction, and the procedure and practice therein, as one act, adopted and approved on the same day, and by the same enactment.

But with this view the difficulty of the attempt to reconcile the provisions of sections 592 and 593 with each other, as well as with the provisions of section 846, still remains. Section 592, standing alone, we think, confers upon this court appellate jurisdiction in all cases, provided that, when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount one hundred dollars, unless the legality of a tax, impost, toll, or municipal fine is drawn in question. *Conant v. Conant*, 10 Cal. 253, 70 Am. Dec. 717; *Dumphy v. Guindon*, 13 Cal. 29. And here it may be noted that there has evidently been an error in transcribing this section. After the words "one hundred dollars," there should be a semicolon, and the clause, "or questions of law alone," should read, "on questions of law alone." See cases above cited, and Comp. Laws Ariz., sec. 2339. If the amount in section 593 were one hundred dollars, instead of two hundred dollars, the repugnancy between sections 592 and 593 would be reconcilable. We can conceive of no reason why this difference in amount should have occurred. By reference to the Compiled Laws of 1877, it will be seen whence the provisions of the Revision of 1887 were derived. Comp. Laws 1877, secs. 2339, 2340. The expression, "where the matter in dispute exceeds one hundred dollars," has in the Revision of 1887 (sec. 592) been added to section 2339 in the compilation of 1877. In re-enacting section 2340, "one hundred dollars," there appearing, was made "two hundred dollars" in section 593 of the Revision of 1887. We cannot avoid the conclusion that an unintentional error has crept in, and that "two hundred dollars," in section 593 of the Revised Statutes of 1887 should read "one hundred dollars." So reading it, our construction of sections 592 and 593 is, that section 592 confers

appellate jurisdiction upon this court in all cases, provided the amount in dispute, if capable of pecuniary computation, exceeds one hundred dollars, unless the legality of a tax, toll, impost, or municipal fine is in question, and unless, in criminal cases, the crime is of less grade than felony. Section 593 simply authorizes this court, in a case appealed under the provisions of section 592, to review, not only the judgment itself, but any intermediate order involving the merits, and necessarily affecting the judgment,—orders granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in the action or proceeding so appealed.

Still the conflict between the sections 592 and 593, as construed, and section 846, as to the amount in dispute, remains. Section 846 provides for appeals from the final judgments in all civil cases. Section 592 limits the right to certain cases. The right sought to be given by these provisions is to have an erroneous judgment of the district courts reviewed and corrected by the supreme court. Section 846 gives the right in all cases. Section 592 is inconsistent with that, and limits the right. In such a case, applying a well-known rule of statutory construction, we construe in favor of the enlarged right, rather than of the limited one. Our construction of the statute on the subject of appeals, then, is that an appeal from the final judgment of the district court in all civil cases is allowed; that, upon such appeal from a final judgment, this court may review any intermediate order involving the merits, and necessarily affecting the judgment,—orders granting or refusing new trials, sustaining or overruling demurrers, or affecting any substantial rights of the parties,—and may render such judgment or make such order therein as may be proper to save the rights of the parties. Of course, in special proceedings, this right of appeal may be expressly limited, as we decided in *Bishop v. Perrin*, ante, p. 350, 29 Pac. 648, (at this term).

The contract of purchase was in writing. Appellee answered by the general denial; and, *second*, that the alleged contract in writing was had and obtained by means of the imposture, deceit, and fraud of the appellant. Appellee alleges in his answer that on or about the seventeenth day of April, 1888, he was approached by an agent of appellant, who represented

to appellee that appellant was about to publish a book which would contain certain biographical sketches of prominent and distinguished gentlemen of the territory, and among them a memoir of the appellee; that said agent procured from appellee information of and concerning certain facts and reminiscences touching the life, career, and business, and antecedents of appellee, to the end that appellant might make publication thereof in said book, whereupon said agent importuned appellee to subscribe for and receive one copy, and no more; that appellee, being disposed to read of and concerning himself, agreed to subscribe for said book, and then and there appellee orally contracted and agreed, but in no other way, with appellant, to receive and pay for, when delivered, one copy, and no more, of said book, that appellee, as said agent then well knew, neither made nor intended to make any other or different contract; that, after the making of said oral contract, said agent forthwith deceitfully and fraudulently, and with intent to cheat, defraud, and circumvent appellee, substituted for and in place of said oral agreement, and presented to appellee for his signature, a certain other and different contract, being the contract sued on; that appellee, relying upon the fidelity and common honesty of said agent, and believing that said agent had in said written contract truthfully represented the wish and intention of appellee, and not suspecting the said fraudulent substitution, signed said contract under that impression; that, if appellee had known of such substitution, he would not have signed it; that, upon the discovery of the fraud, he promptly repudiated the alleged contract, and refused to accept the books. This answer was duly verified. Appellant demurred to the answer, which demurrer was overruled, and this is the first error complained of. The allegations in this answer of the representations by the appellant of its intention to publish biographical sketches, including that of appellee, as pleaded, are wholly irrelevant, and should be stricken out. It is not alleged that these representations were false, or that appellee was induced to subscribe because of his disposition to read of and concerning himself in the book; nor can fraud be predicated upon a representation of an existing intent to hereafter do or not do a particular thing. It does not appear but that the bio-

graphical sketch of appellee, among those of other prominent and distinguished gentlemen of the territory, appears in the book, and, inasmuch as the *data* therefor were furnished by appellee himself, we cannot know but that the gratification he experiences from reading of and concerning himself amply recompenses him for the trouble he incurred in furnishing the *data*, and the price he agreed to pay for the book. There remains of the answer simply that appellee made an oral agreement, and that, immediately thereupon, appellant fraudulently substituted a written memorandum expressing an entirely different contract. The application of the epithet "fraudulent" to a transaction is not a sufficient allegation in a pleading of fraud. It is not unusual that the terms of a contract subsequently reduced to writing should first have been orally agreed upon, and the subsequent written contract is a substitution. There is no allegation in this answer that the substitution was accompanied by any act or characterized by any omission of appellant's agent that would warrant the inference that any imposition upon appellee had been practiced. It does not appear, and we cannot assume, that appellee could not read. His expressed willingness to read of and concerning himself in the book negatives such an assumption. It does not appear that appellant's agent concealed from him the contents of the memorandum, or that he falsely read it to appellee. It seems that, if in fact there had been a substitution of a different agreement for the one appellee alleges he made, it was due to the utter carelessness and negligence of appellee himself. Negligence on the part of the appellee would not be a ground for withholding relief against fraud, if fraud actually existed; but, as we have said, there is no proper allegation of fraud. Courts will not undertake to protect men against such a total want of caution and care as appears in this case, from appellee's own allegations. There was nothing in the relation of the parties to warrant such childlike confidence in the fidelity and common honesty of appellant's agent as that displayed by appellee. The mere suggestion that the oral contract, which appellee says was complete, be reduced to writing, ought to have prompted appellee to a reasonable degree of care in its execution. The demurrer to the answer should have been sustained. There



was a trial and finding for defendant. There was a motion for a new trial, which was overruled.

We would not disturb the finding of the lower court if there was simply a conflict of evidence. The defendant testified that appellant's agent called on him, and stated the intention of appellant to publish a history of Arizona, in which was to be incorporated biographies of prominent and distinguished men of the territory, and that he (appellant's agent) was getting *data* therefor; that the agent asked him if he would take a copy; that the agent pretended to be making sketches—to be writing—at the time; that appellee said he would take a copy, and started to leave the room, when the agent recalled him and said, "Wait a moment, and I will get you to sign an order;" that the agent thereupon wrote it, handed it to appellee, who thereupon signed it without noticing it, and shoved it back. Long, the agent, testified that he met appellee in Prescott, and stated to him that he desired to gather information to be used by Bancroft in the completion of his history of Arizona; that appellee gave him some general information; that he did not agree or represent that the biography of appellee would be published in the work; that he there explained the character and scope of the Bancroft series, and solicited his subscription therefor; that he explained that the complete work consisted of thirty-nine volumes, twenty-eight of which were then issued; that nothing was said in regard to his subscription for one volume; that appellee then designated the style of binding he wanted; that he (the agent) then sat down in Mr. Dougherty's presence, and filled out the contract, style of binding, and terms of payment; that appellee then took the contract, looked it over, and signed it. It was admitted at the trial that the thirty-one volumes had been consigned by appellant to appellee, and that appellee refused to accept them. The contract itself was introduced in evidence. There is some other testimony in the record, but it is all incompetent, and need not be considered. In the cross-examination appellee admits that the agent explained to him that the work consisted of a number of volumes, embodying the history of all the states and territories and of Old Mexico. Taking the statements of appellee as absolutely true, we think the court should have found for the appellant.

The written contract was the only evidence of the contract as finally made, unless it be vitiated by fraud. There is no evidence that appellee could not read. Nothing was said or done to prevent appellee reading the contract before signing, or to induce him not to read it. It was handed to him, and he had every opportunity to read it. No statement of any kind was made to him by appellant's agent of the contents of the contract before he signed it. The contract was not misread to him. Even if it be conceded that appellee contracted orally for the one book, nevertheless that contract was merged in the written one, and the written one must prevail. A person of ordinary intelligence is bound to know the contents and nature of an instrument he signs, unless he was imposed upon by some fraudulent device in the procurement of his signature.

Appellant complains of the rejection of testimony of certain witnesses, to the effect that appellant's agent, about the time of the transaction in this case, solicited subscription for the entire thirty-nine volumes, and not for any less. This was irrelevant, and was properly rejected. The judgment of the district court for Yavapai County is reversed, and that court is directed to grant a new trial and to sustain the demurrer to appellee's second answer.

Gooding, C. J., and Wells, J., concur.

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[Civil No. 322. Filed January 30, 1892.]

[31 Pac. 521, *sub. nom.* Behan v. Board of Prison Commrs.]

JOHN H. BEHAN, Petitioner. v. W. C. DAVIS et al., Respondents.

1. OFFICERS—SUPERINTENDENT OF TERRITORIAL PRISON—APPOINTED BY GOVERNOR WITH CONSENT OF ASSEMBLY—REV. STATS. U. S., SEC. 1857 (ORGANIC ACT, REV. STATS. ARIZ. 1901, PAR. 23), CITED.—The office of superintendent of the territorial prison is within the provisions of the statute, *supra*, and may only be filled by nomination by the governor and assent thereto by the legislative council.

2. SAME—SALARY—DE FACTO OFFICER—WHEN ENTITLED TO COMPENSATION FROM TERRITORY.—An officer *de facto*, but not *de jure*, there being no *de jure* officer is entitled to the emoluments of the office of which he is actually the incumbent.

Original Application for mandamus. Writ allowed.

W. H. Barnes, Webster Street, and H. N. Alexander, for Petitioner.

Clark Churchill, Attorney-General, for Respondents.

KIBBEY, J.—This is an application made to this court by John H. Behan for a writ of mandate to compel the board of prison commissioners to audit and allow his claim for services alleged to have been performed by him as superintendent of the territorial prison. The compensation for such services is fixed by statute by way of salary. Preliminary to a statement of the facts, a *résumé* of the statutory provisions affecting the question presented for our consideration is necessary. The act of March 10, 1887, (Rev. Stats. 1887, sec. 2417 et seq.) provides for the general management of the territorial prison by a board of territorial prison commissioners. By section 2421 they are required to appoint a superintendent for the territorial prison, who shall hold his office for a period of two years, unless sooner removed by the board for misconduct, incompetency, or neglect of duty. That section further provides that the superintendent shall receive for his services seven hundred and fifty dollars per quarter. By section 2432 it is made the duty of the board of prison commissioners to audit all accounts quarterly, and approve them if they be found correct, and cause them to be certified to the territorial auditor. Upon such certificate the auditor issues his warrant upon the territorial treasurer. His duties are defined by statute. Section 1857 of the Revised Statutes of the United States, (being a part of our organic act,) provides that all township, district, and county officers, except justices of the peace and general officers of the militia, shall be appointed or elected in such manner as may be provided by the governor and legislative assembly; and all other officers, not herein otherwise provided for, the governor shall nominate, and, by and with the consent of the legislative council, appoint. In

the district court in and for Maricopa County, in a proceeding in the nature of *quo warranto*, a judgment was on the eighteenth day of June, 1890, at the suit of the attorney-general of the territory, rendered against Behan, ousting him from the office of superintendent of the territorial prison. The district court held—and in this court, so far as the consideration of this case is concerned, it has not been disputed—that the office of superintendent of the territorial prison was within the provisions of section 1857 of the Revised Statutes of the United States, before quoted, and accordingly could only legally be filled by nomination by the governor and assent thereto by the legislative council. Prior to the bringing of the suit in the district court by the attorney-general against Behan, it had been the practice that the superintendent should be appointed by the board of prison commissioners, and the legality of that practice up to the time of the judgment of ouster against Behan seems to have been unquestioned. On the ninth day of April, 1889, in pursuance of the practice theretofore prevailing, the board of prison commissioners appointed Behan superintendent of the territorial prison. Behan thereupon qualified, and entered upon the discharge of his duties, and continued therein until the 5th or 6th of July of the following year, when, pursuant to the judgment of ouster on the *quo warranto* proceedings, he surrendered the office. There was during that interval a rival board of prison commissioners, which, by resolution dated in October, 1889, attempted to remove Behan, and appoint a successor. It is not necessary here to determine which of the rival boards was the legal board. It is sufficient to say that on the 9th of April, 1889, the board that appointed Behan was the *de facto* board. No question is made as to the validity of their acts, within their power made at that time. It appears that the board that sought to remove Behan did so without notice to him of any charge of misconduct, incompetency, or neglect. We think he was entitled to such notice before the board could remove him, and that their resolution removing him was, in any event, therefore abortive. Frank Ingalls, was by one of the rival boards, in October, 1889, appointed superintendent of the prison. Of course, this appointment, under the ruling in the case in the district court of the attorney-general against

Behan, was invalid. Ingalls was, however, on the twenty-fourth day of May, 1890, appointed to the office of superintendent of the prison by the governor of the territory, the legislative council then being at recess, and duly qualified for his office on the twenty-seventh day of May, 1890. From the ninth day of April, 1889, the day of his appointment by the board, until the twenty-seventh day of May, 1890, the date of the appointment of Ingalls by the governor, and his qualification therefor, Behan was *de facto* superintendent of the prison, and, as such, discharged all the duties thereof, and there was in that interval no *de jure* superintendent. It is this interval for which Behan claims his salary. The only question, then, that is presented to us is: Is an officer *de facto* but not *de jure*, there being no *de jure* officer, entitled to the emoluments of the office of which he was actually the incumbent? Counsel, and as well the court, have made diligent search of the books, and no authority in point has been found; indeed, none analogous. It is almost elementary that the right to the emoluments of an office are incident to the title to the office; that, as between an officer *de facto* and one *de jure*, notwithstanding the *de facto* officer may have performed all the duties of the office, the *de jure* officer is entitled to the legal compensation; and the reason is obvious. A usurper of any office should not be permitted to avail himself of his own wrongful act of usurpation to deprive him who is rightfully entitled to the office of his emoluments. The contrary rule would directly encourage usurpation of office. It is hardly necessary to cite authorities for this proposition. It is not here denied by counsel for the applicant. The question here presented, however, is essentially different. There is in this case no dispute as to the title to the office; no adverse contestant for it. There is no *de jure* officer. There can be but one *de facto* officer, and he is here asking the process of this court to secure his compensation of superintendent of the territorial prison from April 9, 1889, to the date of the appointment and qualification of his successor by the governor.

There is a stipulation on file, whereby the territory shall be allowed certain credits. Subject to these, a peremptory writ of *mandamus* will go as prayed.

Gooding, C. J., and Wells, J., concur.

NOTE.—The opinion of the court in this case was delivered orally by Kibbey, J., at the January term, 1891. The written opinion was filed at the January term, 1892, there having been no intervening term of the court.

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[Criminal No. 72. Filed September 29, 1892.]

TERRITORY OF ARIZONA, Plaintiff and Respondent, v.  
DANIEL B. SHANKLAND, Defendant and Appellant.

1. APPEAL AND ERROR—MOTION FOR NEW TRIAL—ASSIGNMENTS OF ERROR—SUFFICIENCY—REVIEW OF EVIDENCE.—The motion for new trial assigns as reason therefor, "The verdict is contrary to the law and the evidence," and the ninth assignment of error is, "The court erred in overruling the motion of defendant for a new trial for reasons stated in the motion." This brings the evidence before us for consideration. Evidence reviewed and held sufficient to support the judgment.
2. TRIAL — CONTINUANCE — COUNTER-AFFIDAVITS. —Counter-affidavits to those in support of an application for a continuance may be allowed.
3. VENUE—CHANGE OF—DISCRETIONARY—REV. STATS. ARIZ. 1887, PAR. 1568, PENAL CODE, CITED—APPEAL AND ERROR—REVIEW—ABUSE OF DISCRETION.—A motion for a change of venue is addressed to the discretion of the trial judge. Paragraph 1568, *supra*, cited. It is competent for this court to look into the whole case, upon review of such motion, based upon the ground that the applicant cannot have a fair and impartial trial, to determine whether the exercise of discretion was wrongful and to the prejudice of the defendant, and when it appears that the evidence leaves no doubt as to the legal guilt of the defendant, and the defendant did not exhaust his peremptory challenges before he accepted the jury, though ordinarily the showing made for the change would have required a reversal for abuse of discretion in its refusal, the judgment will be affirmed.
4. JURY—APPEAL AND ERROR—CHALLENGES—HARMLESS ERROR.—The refusal of a proper challenge for cause is not reversible error when there remain unexhausted challenges at the time of going to trial.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

W. H. Barnes, and J. H. Martin, for Appellant.

The court erred in permitting counter-affidavits to be filed by the prosecution on motion of defendant for a continuance. *Bishop v. State*, 9 Ga. 121; *State v. Simien*, 30 La. Ann. 296; *Jackson v. Mason*, 1 Dall. 135; *United States v. Caldwell*, 2 Dall. 333; *Symes v. Irvine*, 2 Dall. 383; *Cook v. Burnley*, 11 Wall. 669; *Müller v. State*, 29 Neb. 437, 45 N. W. 452; *Hair v. State*, 14 Neb. 503, 16 N. W. 829; *Williams v. State*, 6 Neb. 334; *Johnson v. Dinsmore*, 11 Neb. 391, 9 N. W. 558; *Gandy v. State*, 27 Neb. 707, 43 N. W. 747.

The application for change of venue should have been granted. Application verified by affidavit may be rebutted by the territory, but if the court is satisfied that the representation is true, an order for removal must be made. The words "if the court is satisfied" must be held to mean if the court from the showing ought to be satisfied. The court cannot arbitrarily say, "I am not satisfied." If there be such a showing as clearly makes out the truth of the representation then the court must grant the change and not to do so is error. *Rapalje's Criminal Procedure*, 158; *Johnson v. Commonwealth*, 82 Ky. 116; *People v. Long Island R. R. Co.*, 4 Park. 602; *State v. Andrews*, 76 Mo. 101; *Richmond v. State*, 16 Neb. 388, 20 N. W. 282; *People v. Mahony*, 18 Cal. 180; *People v. Schouler*, 28 Cal. 490; *State v. Nash*, 7 Iowa, 347; *O'Neal v. State*, 14 Tex. App. 582; *State v. Burbeck*, 29 Kan. 532; *State v. Kelly*, 2 N. Y. 292.

The court in refusing to allow the challenge to the jurors Turner and Gibson was clearly in error. Both had formed opinions as to defendant's guilt or innocence. Each said that nothing but sworn evidence would change the opinion. Gibson announced the opinion that defendant killed the deceased. Eleven of fourteen challenges were exhausted. In such a case to force the defendant to use two of these on these two persons (jurors) was error. *Wannesheik Ins. Co. v. Schuller*, 60 Ill. 473; Marshall, in Burr's Trial, 1-416; Dissent of Dickey, J., in *Robinson v. Randall*, 82 Ill. 524; *People v. Bodine*, 1 Denio, 9; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *People v. Stewart*, 7 Cal. 140; *Brown v. State*, 57 Miss. 15; *Stewart v. State*, 13 Ark. 720.

A juror whose opinion is such as to require evidence to re-

move it is disqualified. *Nelms v. State*, 13 Smedes & M. 500, 53 Am. Dec. 94; *People v. Gehr*, 8 Cal. 353; *Cotton v. State*, 31 Miss. 509.

William Herring, Attorney-General, and Allen R. English, for Respondent.

The granting or refusing a continuance is purely discretionary. *People v. Gaunt*, 23 Cal. 157; *People v. Williams*, 24 Cal. 31; *People v. Jocelyn*, 29 Cal. 562; *People v. Jackson*, 111 N. Y. 362, 19 N. E. 54.

If the facts shown cast suspicion on the good faith of application, and induce suspicion of intent of delay, court does not abuse discretion in denying it. *People v. Mortimer*, 46 Cal. 114.

Facts should also be set out from which the court can judge whether there is reasonable ground to believe that the attendance of the witness or his testimony can be procured at a future day. *People v. Francis*, 38 Cal. 183; *People v. Ashnauer*, 47 Cal. 98.

If the evidence would be no defense the motion should be denied. *People v. Williams*, 43 Cal. 344.

The court properly refused to change the venue. Our whole law relating to the change of venue is taken from the California statute (Cal. Pen. Code, secs. 1033, 1038). And the courts there have settled the question presented by the record, arising on a construction of the language used in our paragraph 1567, regarding the sufficiency of the showing. In *People v. Fisher*, 6 Cal. 154, and in the later case of *People v. Yoakum*, 53 Cal. 566, the court says: "Affidavits upon motion for change of venue must state facts and circumstances from which the court may deduce the conclusion that a fair and impartial trial cannot be had. Such conclusion is to be drawn by the court, and not by the defendant and his witnesses, and the court must be satisfied by the facts and circumstances positively sworn to in the affidavits, and not from the general conclusion to which the defendant may swear, or which the witnesses may depose they verily believe to be true."

And it is again said that an affidavit that a jury cannot be selected from a certain portion of the county is insufficient.



*People v. Baker*, 1 Cal. 403. Neither will a statement generally that the people of the county are prejudiced against the defendant be sufficient. *People v. Shuler*, 28 Cal. 490. Neither is the mere belief or opinion that he cannot have a fair and impartial trial in the county sufficient. *People v. Congleton*, 44 Cal. 95; *People v. Perdue*, 49 Cal. 427.

The ruling of the court was right in refusing challenges to the jurors mentioned by appellant. Of course, they knew that Dr. Willis was dead. The question is whether they had formed or expressed an unqualified opinion as to whether the defendant was guilty or not of the charge of murder. "An opinion formed or expressed is not sufficient to disqualify." Ariz. Pen. Code, par. 1629. But if error, it was not prejudicial, because they did not exercise all their peremptory challenges. *People v. McGungill*, 41 Cal. 429; *People v. Gatewood*, 20 Cal. 149; *People v. Gaunt*, 23 Cal. 156; *People v. Weil*, 40 Cal. 268; *Fleeson v. Savage M. Co.*, 3 Nev. 157; *State v. Raymond*, 11 Nev. 98.

GOODING, C. J.—The evidence in this case is before this court, brought here by the eleventh assignment of error, and has been carefully read and considered.

That the defendant shot and killed the deceased at the time and place alleged in the indictment was clearly proven, and in fact is not disputed on the part of the accused.

The only issue going to the merits of this case is well expressed in the brief of the appellant in these words:—

"On the trial the issue was whether the defendant shot in self-defense or not; if he did, he was justified,—if not, he was guilty of murder."

This being the admitted issue, and the only one affecting the merits, we have carefully read all the evidence to ascertain its force and weight bearing on this particular case. The evidence discloses the fact that deceased, Dr. Willis, had just seated himself in his buggy when the defendant approached and without a word of warning reached over the dashboard with a gun—or a pistol, more accurately speaking—and shot the deceased, inflicting a mortal wound. That while deceased was falling, the defendant shot a second time; and after he had fallen at least two or three more times at him and then walked

away. No word passed between defendant and deceased. These facts are established by credible and disinterested eye-witnesses.

Only two of these five shots took effect. The shooting occurred between three and four o'clock in the afternoon, and death ensued about six o'clock of the same afternoon. There was no evidence tending to show self-defense except the unsupported evidence of the defendant. He testified to a peculiar look given him by the deceased, and that deceased put his hand to his hip-pocket as if to draw a revolver. No other witness saw the peculiar look, or the reaching for the hip-pocket, or any act or fact that tended to show an attempt on the part of the deceased to draw a pistol or make any assault on the defendant. There was no evidence that the deceased had a pistol at the time; none was found on his person or at the place of the homicide. There is not a shadow of evidence that the defendant was in the least danger except the evidence of the defendant. The deceased had just entered his buggy to drive away, when he was approached by the defendant and shot as above set forth.

A number of witnesses, too, testified to threats made by the defendant that he would kill the deceased. There was also evidence of threats made by the deceased, communicated to the defendant, and very strong evidence by the defendant himself, often repeated, that the deceased made a move towards his hip-pocket, and also of warning by the deceased to defendant not to speak to him again. This warning was, however, some days before the shooting; but the evidence clearly establishes that the defendant sought the deceased, and, without a word passing, put his revolver over the dashboard of the buggy and shot the deceased, giving a mortal wound, and then shot a second time as the deceased was falling out of the buggy, and then three more shots after he had fallen.

Immediately after the shooting the defendant was arrested by George Braven, and Braven said to him, "Dan, what in h—l did you do that for?" His reply was, "I have been having trouble with the s— of a b—." No word of "self-defense" or "attempt on the part of the deceased to get a pistol out of his pocket."

We deem it unnecessary to discuss all the evidence in the

case. Counsel concede that if the defendant did not shoot in self-defense he was guilty of murder.

The motion for a new trial assigns eleven grounds or reasons therefor. The eleventh reads as follows: "The verdict is contrary to the law and the evidence." The ninth assignment of error, is as follows: "The court erred in overruling the motion of defendant for a new trial for reasons stated in the motion."

This brings the evidence before us for consideration. We think the evidence establishes the guilt of the defendant beyond a reasonable doubt, and that the killing was deliberate and cold-blooded.

This is the case on its merits. Was, then, the error on the trial prejudicial to the defendant? We shall only consider such errors as are referred to in the appellant's brief.

The defendant filed his motion for a continuance based on his disability to go on with the trial by reason of ill-health and also on account of the absence of Mrs. James, setting forth what he expected to prove by her, viz., threats made and communicated, and the fact that the now deceased, Dr. Willis, was armed at the time. In support of this motion he filed his own affidavit and that of his physician. Counter-affidavits were allowed as to the health of the defendant, and as to what Mrs. James had sworn on the former trial.

We think the record of the case, as well as the affidavit of the physician who examined him, clearly shows that the defendant was able physically and mentally to pass the ordeal of the trial. The fact that he refused to be examined by a second physician, in connection with the history of the trial, and the affidavit of the one who did examine him, leaves no doubt in the mind of this court that there was no merit in the application for a continuance on this ground. We simply hold that in some cases counter-affidavits may be allowed, and this case is one in which they were properly allowed.

As to the evidence of Mrs. James, the defendant testified that threats were made to her, what they were, and that she communicated them to him, and the fact that Willis the deceased was armed at the time. But in view of the fact that substantially the same threat was communicated to the defendant by McMahon, and the utter absence of any facts

tending to show that the defendant was in the least danger, or in any position that would have caused a reasonable man to believe that he was in danger, at the time the fatal shot was fired, we cannot say that there was such error, if any, as to justify the reversal of this case on account of the refusal to grant a continuance for the presence of Mrs. James. Besides, the affidavit of Mrs. James was not produced in the hearing of the motion for a new trial.

Another ground insisted upon for a reversal is the refusal of the court to grant a change of venue.

The showing in this respect is much stronger than the showing for a continuance. There were a large number of jurors excused for bias, and the affidavits showing excitement and prejudice were sufficiently numerous and of such character as might have caused the court to believe it altogether probable that the verdict might have been influenced thereby, had the evidence in the case left any room for such a conclusion. This motion, like a motion for a continuance, is addressed in the first instance to the discretion of the trial judge.

The statute provides (Pen. Code, sec. 1568): "If the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from a like objection." In a case where it appears that this discretion was abused to the prejudice of the defendant, the court would feel called upon to review the case. We think, however, it is competent for this court to look into the whole case, at least when the entire case is before it by assignment of error, to determine whether the exercise of discretion was wrongful and to the prejudice of the defendant. If the evidence in the case left room for any doubt as to the legal guilt of the defendant, we would be constrained to hold that in the showing made by the affidavits the discretion of the court below had not been properly exercised.

In the case of *Hyde v. State*, 16 Tex. 459, 67 Am. Dec. 630, when considering a question of wrongful exercise of discretion in refusing a motion for continuance,—and we think the language is applicable alike to a refusal to grant a change of venue,—the court says: "But in considering the case upon appeal, when the motion for a new trial brings before us a statement of the evidence upon the trial, we do not feel bound

to shut our eyes wholly to the facts of the case, in considering whether the judgment ought to be reversed for the refusal of the court to grant a continuance. If, upon the trial there had appeared to be cause to apprehend that a continuance was improperly refused, a new trial must have been granted.

"But if, on the contrary, it very satisfactorily appears that the application for a continuance could not have been well founded in fact, it must afford an additional reason for refusing a new trial, or to reverse the judgment on that ground. We forbear comment upon the evidence. It may suffice to say that several witnesses, who were eye-witnesses of the homicide, had ample means and opportunity of seeing and observing all that passed, and could not be mistaken as to the author of it, testified positively as to the fact, with such circumstantial particularity, and just such diversity as to immaterial matters as to show that there was no collusion; and such perfect unanimity as to the material facts, which were calculated to make a strong, abiding impression upon the memory, as to show that they were not and could not be mistaken.

"It thus appears that there were other witnesses than those named in the affidavit by whom all the facts and circumstances attending the fatal scene could be abundantly proved; that the witnesses whose testimony was sought could not, if present, have testified to the truth of the fact proposed to be proved by them, and that the affidavit for continuance, therefore, was not entitled to credit. We have thus looked into the evidence upon the motion for a new trial, which necessarily brings it under review, and we advert to it, not as a ground for affirming the judgment of the court refusing a continuance, but as placing it beyond doubt that no injustice could have been done the defendant by refusing his motion, which was rightfully refused, on the ground of its want of legal sufficiency."

We cite the above as an authority that the court did not err in refusing a continuance, and also to the point that the evidence may be considered in passing on the question when there was reversible error in the refusal to grant a change of venue.

The record shows that there still remained to the defendant three peremptory challenges at the time he accepted the jury and went to trial. While this fact is perhaps not conclusive,

it is a fact which this court may consider, in connection with the overwhelming evidence of guilt, in determining whether the discretion exercised by the trial judge was such an abuse of discretion as to call for a reversal in this case, and award a new trial in another county. On a review of the whole case, we do not see how any jury in any county, on the evidence in the case, could have found any other verdict, unless it would be a verdict of guilty of murder—instead of manslaughter.

It is further complained that the court erred in refusing to allow the challenges to the jurors Gibson and Turner. As we have before stated, the defendant had three peremptory challenges at the time of going to trial. If the court had erred as to those jurors, the remedy was in the hands of the defendant.

That it is not reversible error to refuse a proper challenge when there remains unexhausted challenges at the time of going to trial. We cite the following as expressing the better law on this question. *Johnson v. State*, 27 Tex. 758; *State v. Raymond*, 11 Nev. 98; *People v. McGungill*, 41 Cal. 429; *People v. Galewood*, 20 Cal. 149; *Rosenberg v. Black*, 102 N. Y. 259, 6 N. E. 580.

After a careful consideration of the grounds for a reversal set out in the brief of the appellant, we have reached the conclusion that the judgment below should be affirmed.

It is therefore ordered that the judgment below be affirmed.

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[Civil No. 358. Filed November 7, 1892.]

**Ex Parte:** In the Matter of R. C. and G. W. BROWN, Petitioners.

1. **CONTEMPT—REVIEW—HABEAS CORPUS.**—This court will not grant a writ of *habeas corpus* where a party has been committed for a contempt by a court having jurisdiction of the person and the subject-matter.

**APPLICATION** for a Writ of Habeas Corpus. Denied.

H. B. Lighthizer, and C. F. Ainsworth, for Petitioners.

Joseph Campbell, for the Sheriff.

GOODING, C. J.—The record in this case discloses that the defendants were cited regularly to appear in the district court to answer a charge of contempt of court, preferred in writing, and that they did appear and answered, and that there were facts presented to that court upon which that court adjudged that a contempt had been committed.

I conclude that its decision upon that issue is one that this court cannot review; and I think the authorities are abundant and overwhelming on this proposition. If the law were otherwise, there would be no such thing as preserving order in courts or preventing a collision between courts. I think the proposition is well settled, and not open to doubt or dispute. On the facts set up in the record as shown to this court, by the record produced herein, that court found that it had jurisdiction of the parties and the subject-matter, and found facts showing that it had jurisdiction. It having jurisdiction of the subject-matter and of the parties, this court has no power or authority to interfere with the judgment of that court in that matter.

I must therefore remand the prisoners into the custody of the sheriff of Pima County.

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[Civil No. 326. Filed November 10, 1892.]

[31 Pac. 548.]

T. J. BRYAN, Plaintiff and Appellant, v. D. H. PINNEY  
et al., Defendants and Appellees.

1. EJECTMENT—DEFENSE—ESTOPPEL IN PAIS.—Kales, mortgagee of Bryan, was, upon Bryan's death, appointed administrator of his estate at the widow's suggestion. To enforce his mortgage debt K. brought suit against himself as administrator and the property was sold for its market value to him under the order of sale. The widow and plaintiff, her grantee, had full knowledge of the suit to foreclose and sale but failed to redeem. Kales assigned the certificate to Pinney, who with his grantees were in possession for more than three years prior to the commencement of the action, paying taxes and making valuable improvements, with the knowledge and acquiescence of the widow and plaintiff. Though the decree under

which the sale was made may have been a nullity, likewise the sale, the plaintiff and the widow, knowing that the claim of the defendants to the property rested upon that sale, by remaining silent and permitting the expenditures by defendants, are now estopped to assert title.

2. SAME—MORTGAGES—INVALID FORECLOSURE—ASSIGNEE OF CERTIFICATE OF SALE SUBROGATED TO RIGHTS OF MORTGAGEE—MORTGAGEE IN POSSESSION.—The mortgagee, under an attempted foreclosure, purchased the property at the sale for the amount of the debt, and assigned the certificate, for value, to defendants, who thereby if the sale under foreclosure was invalid became the assignees of the mortgage debt. The defendants entered peaceably into possession, with plaintiff's knowledge, and made improvements. The possession being lawful, defendants are mortgagees in possession after condition broken, and should be protected therein.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

Webster Street, and Ben Goodrich, for Appellant.

As an estoppel by judgment, the allegations show that the judgment of *Kales v. Kales*, administrator of J. M. Bryan, deceased, upon which they rely, is absolutely void on its face. There can be no suit without adverse parties, and a judgment rendered in an action where the same person is both plaintiff and defendant is absolutely void, and cannot be the foundation of title. *Bryan v. Kales*, 134 U. S. 135, 10 Supp. Ct. Rep. 435; *Graham v. Harris*, 5 Gill & J. 490; *Hall v. Pratt*, 5 Ohio, 83; *Page v. Patten*, 5 Pet. 312; *Paschall v. Hailman*, 4 Gilm. 300; *Denny v. Metcalf*, 28 Me. 389; *Barley v. Harris*, 8 N. H. 233, 29 Am. Dec. 650; *Eastman v. Wright*, 6 Pick. 320; *Livingston v. Livingston*, 2 Mill, 428, 12 Am. Dec. 684, where the question of an executor suing himself is passed upon, and also *Pearson v. Nesbit*, 1 Dev. & B. 315, 17 Am. Dec. 569; *Griffith v. Chew*, 8 Serg. & R. 17, 11 Am. Dec. 556; *Blaisdell v. Ladd*, 14 N. H. 129; *Ford v. Whedbee*, 1 Dev. & B. Eq. 16; *Moffat v. Mullinger*, 2 Chitty, 539, S. C. 2 Bos. & P. 124; *Trustees Methodist Church v. Stewart*, 27 Barb. 553; *In re Armstrong*, 69 Cal. 240, 10 Pac. 235; *Brown v. Mann*, 71 Cal. 192, 12 Pac. 51; *Buchanan v. Meisser*, 105 Ill. 643.



The phrase used by some of the courts that a person cannot sue himself at law means nothing more than that the law courts cannot adjust the respective rights and equities between plaintiffs and defendants who are interested on both sides of the same suit, as, for instance, where one partnership sues another, and some of the parties belong to both firms, and hence turn them over to courts of equity. Freeman on Judgments, sec. 158; 1 Herman on Estoppel, sec. 138; *Corcoran v. Chesapeake etc. Co.*, 94 U. S. 741.

The law is, that identity of name is *prima facie* identity of person. 1 Greenleaf on Evidence, sec. 575, note; Taylor on Evidence, sec. 1860; *Thompson v. Manrow*, 1 Cal. 428; *Moll v. Smith*, 16 Cal. 554; *Garwood v. Garwood*, 29 Cal. 520; *Brown v. Metz*, 33 Ill. 343, 85 Am. Dec. 277; *Gitt v. Watson*, 18 Mo. 274; *State v. Moore*, 61 Mo. 276; *Godell v. Hibbard*, 32 Mich. 55; *Campbell v. Wallace*, 46 Mich. 320, 9 N. W. 432; *Jackson v. King*, 5 Cow. 239, 15 Am. Dec. 468; *Jackson v. Cody*, 9 Cow. 149; and the burden of disproving it is on the defendants. See two cases last cited.

That evidence *aliunde* the record is admissible to show identity, and that such proof does not contradict the record is settled law. *Garwood v. Garwood*, 29 Cal. 520.

The district court had no jurisdiction to try the case of *Kales v. Kales*, administrator, No. 326, and the pretended judgment in that case is an absolute nullity. Jurisdiction is defined to be the power to hear and determine the subject-matter between parties to a suit; *Rhode Island v. Massachusetts*, 12 Pet. 718, and one of the essentials to its exercise is that proper parties must be before it. *Munday v. Vail*, 5 Vroom, (34 N. J. L.) 422. It follows of necessity that without proper adverse parties, the court had no jurisdiction.

To create an estoppel *in pais*, it must appear, first, that the party making the admission by his declaration or conduct was apprised of the true state of his own title. Second, that he made the admission with the express intention to deceive or with such careless and culpable negligence as to amount to constructive fraud. Third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge. And fourth, that he relied directly on such admission, and will be injured

by allowing its truth to be disproved. *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 367; *Lux v. Haggin*, 69 Cal. 266, 10 Pac. 674; *Brant v. Virginia Coal and Iron M. Co.*, 93 U. S. 336; *Steel v. Smelting Co.*, 106 U. S. 456, 1 Sup. Ct. Rep. 389.

Mere acquiescence is not sufficient; there must be assent. *Lux v. Haggin*, 69 Cal. 266.

Silence without fraud—that is, mere silence unaccompanied by any act calculated to mislead or deceive another to his hurt—never estops a party to claim his own. *Railroad Co. v. Dubois*, 12 Wall. 64; *Cleveland v. Richardson*, 132 U. S. 329, 10 Sup. Ct. Rep. 100; *Ferris v. Coover*, 10 Cal. 631; *Bales v. Perry*, 51 Mo. 449; *Fielding v. Dubose*, 63 Tex. 637; *Hill v. Epley*, 31 Pa. St. 334; *Strong v. Ellsworth*, 26 Vt. 367; *Sulphine v. Dunbar*, 55 Miss. 255; *Mason v. Philbrook*, 70 Me. 57; *Rice v. Dewey*, 54 Barb. 455; *Mayo v. Cartwright*, 30 Ark. 407; *Bramble v. Kingsbury*, 39 Ark. 131; *Neal v. Gregory*, 19 Fla. 356; *Terre Haute Rd. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164; *Viele v. Judson*, 82 N. Y. 32; *Diffenback v. Vogler*, 61 Md. 370; *Stockman v. Riverside L. and I. Co.*, 64 Cal. 59, 28 Pac. 116; *Knouff v. Thompson*, 16 Pa. St. 357.

It is not alleged that defendants were misled by any act or word of Vina Bryan or Brown, that they relied on anything she said or did as an inducement to make the purchase, that she made any misrepresentations of any kind or fraudulently concealed any fact, or used any artifice to throw defendants off their guard, or to entrap or deceive them in any way, nor is it alleged that the means of information as to title of the land was not equally open to them as to her. In such cases the doctrine of estoppel has no application. *Fletcher v. Holmes*, 25 Ind. 458.

When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact. *Brush v. Ware*, 15 Pet. 114. That which puts the party upon inquiry is notice. *Id.* He must look to every part of the title which is essential to its validity. *Id.* 111. See, also, *Hardy v. Harbison*, 4 Saw. 545, Fed. Cas. No. 6060; *Bank of Mendocino v. Baker*, 82 Cal. 117, 22 Pac. 1037.

As to the effect of recitals contained in the sheriff's certificate of sale and deed, see *Bryan v. Crump*, 55 Tex. 12; *Cor-*

*bett v. Clenny*, 52 Ala. 480; *Stidman v. Mathews*, 29 Ark. 650; *Gress v. Evans*, 1 Dak. 387, 46 N. W. 1132; *Wiseman v. Hutchison*, 20 Ind. 40.

At all judicial sales the purchaser gets no better title than the officer of the law has power to sell; he exercises only a naked power. The doctrine of *caveat emptor* applies, and the purchaser is chargeable with notice whether the court had jurisdiction to pronounce the judgment or decree under which the sale was made. *Stigall v. Huff*, 54 Tex. 197; *Reeve v. Kennedy*, 43 Cal. 650; *Chambers v. Jones*, 72 Ill. 281; *Cleveland v. Richardson*, 132 U. S. 329, 10 Sup. Ct. Rep. 100.

If defendants claim that they are mortgagees in possession, then they are concluded by their own averments that they claim under the foreclosure decree, because where a party takes possession under such a decree, he cannot be regarded as a mortgagee in possession. *Davenport v. Turpin*, 43 Cal. 597.

But if this were not so, still plaintiff is entitled to recover. The mortgagee is not entitled to possession until after foreclosure and purchase. Comp. Laws 1877, sec. 2698; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, 9 Cal. 428; *Kidd v. Temple*, 22 Cal. 262. And if he gets possession without or against the consent of the mortgagor, he is a mere trespasser. *Witherell v. Wiberg*, 4 Saw. 232, Fed. Cas. No. 17,917; *Semple v. Bank British Columbia*, 5 Saw. 400, Fed. Cas. No. 12,660; *Russell v. Ely*, 2 Blackf. 575; *Humphrey v. Ward*, 29 Mich. 44; *Hazeltine v. Granger*, 44 Mich. 505.

D. H. Pinney, and Baker & Campbell, of Counsel, for Appellees.

The law presumes in favor of a judgment; that the court rendering it had jurisdiction of the subject-matter; that there were proper and adversary parties before it; and that it had jurisdiction of the persons of those parties. These presumptions accompanied the Kales judgment. Appellant sought to overthrow said judgment by the lesser presumption that the court would presume as against the judgment that plaintiff and defendant were the same person because their names were similar. This presumption does not always follow; whenever

parties of similar names are in antagonistic or inconsistent positions, the law will not presume that they are the same party. *Dorente v. Sullivan*, 7 Cal. 279; *Cooper v. Posten*, 1 Duval, 92, 85 Am. Dec. 610; *Jackson v. Christman*, 4 Wend. 279; *Ellsworth v. Moore*, 5 Iowa, 486; *Bennett v. Libhart*, 27 Mich. 488; *Waller v. Edmonds*, 47 Tex. 469; *Wilson v. Benedict*, 90 Mo. 208, 2 S. W. 283; *Cogswell v. Armstrong*, 77 Ill. 139; *Prescott v. Tuffs*, 7 Mass. 209; *Faulkner v. Faulkner*, 73 Mo. 89.

Defendants' answer showed that Vina Bryan, plaintiff's grantor, was a party to those foreclosure proceedings. Then she was of course bound by the judgment. It also showed that Kales was in possession of the premises by virtue of the foreclosure proceedings, or, in other words, that he was a mortgagee in possession. Kales having become the purchaser at the sheriff sale and received the sheriff's deed therefor, the mortgage has never been satisfied otherwise than by virtue of these foreclosure proceedings. His position is that of mortgagee in possession, and until the mortgage debt has been paid, the grantee of one of the mortgages, this plaintiff can never recover in ejectment. The true and most equitable rule is, that if the mortgagee enters into the possession of the mortgaged premises peaceably he cannot be ejected by the mortgagor until the mortgage debt is paid. *Brobst v. Brock*, 10 Wall. 519; *Johnson v. Sandhoof*, 30 Minn. 197, 14 N. W. 891; *Moulton v. Leighton*, 33 Fed. 143; *Phyfe v. Riley*, 15 Wend. 248; *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. Rep. 129; *Miner v. Beekman*, 50 N. Y. 338; *Jones on Mortgages*, secs. 702-715; *Hennesy v. Farrel*, 20 Wis. 42.

Even in states where the statute is similar to our own, declaring that a mortgage shall not be deemed to be a conveyance so as to enable the mortgagee to recover possession of the premises without foreclosure and sale, it has been said that where the mortgagee enters into possession peaceably, even though it be by virtue of a *void* foreclosure sale, he cannot be ejected by the mortgagor until the debt is *first paid*. *Cook v. Cooper*, 18 Or. 142, 22 Pac. 945. "This view of the law in no manner interferes with the just rights of the mortgagor, and at the same time does not sacrifice the interests of the mortgagee to the merest technicalities of the law which has

sometimes been permitted to prevail and the mortgagee turned out of possession, stripped both of his property and his mortgage debt as well."

How forcibly does this language apply to the case at bar! The mortgage debt remains unpaid. The grantee of the mortgagor says he will not pay it, and that he cannot be compelled to pay it because it is barred by the statute of limitation; he nevertheless demands the possession of the mortgaged premises, taking away from the mortgagee his debt and his security, basing his right so to do only on a technicality of the law, to wit, "Because a man cannot sue himself."

Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud on his title or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he should do that which is consonant with equity. *Spect v. Spect*, 88 Cal. 443, 22 Am. St. Rep. 314, 26 Pac. 203.

Appellant has not done that which is "consonant with equity,"—that is, to pay the mortgage debt,—but, on the contrary, strenuously maintains that he cannot be compelled to do so; so the lower court very properly said he could not recover.

WELLS, J.—This is an action in ejectment brought in the district court of the second (now third) judicial district of Arizona territory on the eleventh day of July, 1887, by T. J. Bryan against D. H. Pinney, Mary E. Pinney, M. H. Sherman, George H. Mitchell, George W. Mauk, and the Bank of Napa, a corporation, to recover block No. 98, situate in the city of Phoenix, in Maricopa County, this territory. The property in question belonged to one J. M. Bryan, who died intestate August 29, 1883, leaving, as sole heir at law, Vina Bryan, his widow, who subsequently married R. D. Brown. She is hereafter referred to as Vina Brown. Plaintiff alleges ownership,

deraigning title from J. M. Bryan, through his estate, by conveyance from said Vina Bryan or Brown. Defendants plead not guilty, and, further, base their defense upon an equitable estoppel. The cause was tried by the court, sitting without a jury, on the eighth day of July, 1890, and on the first day of December, 1890, the court rendered judgment in favor of defendants, from which, and the order denying him a new trial, plaintiff appeals. It appears that said J. M. Bryan was indebted to one M. W. Kales, which indebtedness was evidenced by a promissory note made by said Bryan on the fourteenth day of March, 1883, for the sum of five hundred dollars, payable on the fourteenth day of September, 1883, with interest at the rate of one and one half per cent per month, to secure the payment of which note said Bryan on said fourteenth day of March, 1883, made and delivered to said Kales a certain mortgage, conveying said block No. 98. To enforce the payment of the note and mortgage, Kales, on the twenty-eighth day of September, 1883, brought a foreclosure suit in the district court of the said second judicial district of this territory, in and for the county of Maricopa. Judgment and decree were rendered by the court on the sixteenth day of October, 1883, decreeing a foreclosure of the said mortgage, and a sale of the property conveyed by said mortgage to satisfy the judgment, for \$529.37. The property was sold at public sale, under said decree, on the fifteenth day of December, 1883, and said Kales became the purchaser at said sale for the sum of six hundred dollars. A sheriff's certificate of sale was, upon the completion of said sale, given to said purchaser, who on the thirty-first day of January, 1884, sold and assigned said certificate to the defendant D. H. Pinney, in consideration of the sum of six hundred and fifty dollars. There being no redemption of the property, a sheriff's deed was executed and delivered to said Pinney on the sixteenth day of June, 1884, who went into possession of the property, and has ever since, by himself and his grantees, been in such possession. Subsequent to the making of said sheriff's deed, Pinney conveyed portions of said property to the other defendants in this cause. It further appears that on the twenty-fourth day of September, 1883, said Kales was appointed administrator of said Bryan's estate, and acted

as such until December 6, 1884, when the estate was settled and closed, and the administrator discharged. No distribution of block 98 was made in the administration of the estate. In the foreclosure suit Kales was plaintiff, and also, as administrator of Bryan's estate, was defendant. Plaintiff here assails the judgment and decree of foreclosure, and the proceedings had thereunder, in the former suit.

In determining the rights of the parties in this action, we deem it unnecessary to pass upon the question of the validity of the judgment and decree in the foreclosure suit, or to consider it, beyond where, in connection with the facts appearing in proof, the rights contended for by the defendants were developed. The record shows the following facts to have existed: M. W. Kales was appointed administrator of J. M. Bryan's estate at the suggestion of Vina Brown, the widow of said deceased, Bryan. At the time of the foreclosure sale of block 98,—the property in question,—and for a long time afterwards, she lived across the street from said land, and while defendant D. H. Pinney was in the possession thereof, and erecting improvements and paying taxes thereon. After the foreclosure sale she informed one Mrs. Cotton of her desire and intention to redeem the land, and afterwards declined to do so. Before the time of redemption had expired she (Vina Brown) signed a paper for the purpose of allowing the plaintiff in this action to redeem the property. On the day of the foreclosure sale the plaintiff was present in the town of Phoenix, where the land is situate, for the purpose of bidding on some of the property sold, but arrived too late. He afterwards tried to redeem the property in question. After the sale Mrs. Brown informed Mrs. Cotton that she was going to redeem block 98, but, when informed that defendant Pinney was about to buy it, she said she was glad of it, and did not want to redeem it. This declaration, however, was not communicated to said Pinney. Between the time of the purchase of block 98 by said Pinney, and the date of the commencement of this action, he expended the sum of four hundred dollars in the payment of taxes, and the further sum of four thousand eight hundred dollars in improvements on the premises. The property was sold at the foreclosure sale for its full value. The note and mortgage executed by Bryan to Kales, and the

indebtedness secured thereby, have not been paid, unless they have been paid or satisfied by virtue of said sale.

From this recital of facts, it seems quite satisfactory to us that Mrs. Vina Brown and the plaintiff had knowledge, and must be presumed to have known, of the proceedings of the probate court during the probate of her husband's estate, and of the proceedings in the foreclosure suit, including the sale of the property under the decree, the purchase by defendant Pinney, and his going into the possession of the property sold, paying taxes, and making valuable improvements thereon. On July 11, 1887, three years after the making of the sheriff's deed, this action was brought to divest the defendants of a possession which they held under an apparent title acquired in good faith, by what they supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction,—as we think, a possession, owing to the line of conduct of both Mrs. Brown and the plaintiff, with their knowledge, acquiescence, and consent,—during which possession valuable and lasting improvements were made by defendant Pinney. In the case of *Dickerson v. Colgrove*, 100 U. S. 580, upon the subject of equitable estoppel, or estoppel *in pais*, the court says: "The law on the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice." And in *Daniels v. Tearney*, 102 U. S. 420: "The principle of estoppel has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on." In *Wendell v. Van Ransselaer*, 1 Johns. Ch. 344, approved in *Kirk v. Hamilton*, 102 U. S. 76, the court uses the following language: "There is no principle better established in this court, nor one founded on more solid considera-



tions of equity and public utility, than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his own claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." The decree under which the sale was made may have been a nullity, likewise the sale, and plaintiff and Mrs. Brown, knowing that the claim of defendants to the property rested upon that sale, for three years stood by and remained silent while defendants expended large sums of money in the paying of taxes and making of improvements on the land. They, in effect, disclaimed title in themselves. In *Evans v. Snyder*, 64 Mo. 516, approved in *Dickerson v. Colgrove*, 100 U. S. 580, the heirs assailed an administrator's sale. No order of sale could be found. This was held to be a fatal defect. But the supreme court of that state held that where they stood silently by for years, while the occupant was making valuable and lasting improvements on the property, and redeeming it from the lien of the ancestor's debts, they would be estopped from afterwards asserting their claim. We see no reason why the defendants may not, under the circumstances disclosed in this action, avail themselves of the doctrine of equitable estoppel in their defense.

Furthermore, in the original case there was an attempted foreclosure, followed by the sale of the mortgaged property. Kales bid the property in for the mortgage debt. Pinney, in good faith and for value, purchased and took an assignment of the certificate of sale. He thereby became the assignee of the mortgage debt, if there was no valid sale of the property under the foreclosure. *Miner v. Beekman*, 50 N. Y. 337; *Robinson v. Ryan*, 25 N. Y. 320; *Jackson v. Bowen*, 7 Cow. 13; *Cook v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709, 22 Pac. 945. If the decree in the original case was a nullity, the mortgage was not foreclosed. It remained in full force and unsatisfied, and the defendants entering peaceably and in good faith, upon receiving the sheriff's deed for the property, and Mrs. Brown and plaintiff having knowledge of such possession and acquiescing therein at the time Pinney made the

improvements on the land, we think such possession a lawful one, and are of the opinion that the defendant's relation to the property was that of a mortgagee in possession after condition broken, and they should be protected in their possession. *Jackson v. Minkler*, 10 Johns. 479; *Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 58; *Van Duyne v. Thayer*, 14 Wend. 233; *Cook v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709, 22 Pac. 945. We are of the opinion that the plaintiff is not entitled to disturb the possession of the defendants. The judgment of the lower court is affirmed.

Gooding, C. J., concurs.

SLOAN, J.—I concur in the views of this court as expressed in the foregoing opinion, not only in holding that the facts show an estoppel *in pais*, but also in holding that, assuming the judgment in the foreclosure suit of *Kales v. Kales, Admr.*, to be void upon its face, all the facts would then exist in this, constituting appellees mortgagees in possession after condition broken. I am, however, of the opinion that the judgment in the suit of *Kales v. Kales, Admr.*, is not open to attack in this action, for the reason stated in *Bryan v. Kales, post*, p. 425, 31 Pac. 517, (decided at this term,) wherein precisely the same point was presented.

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[Civil No. 327. Filed November 10, 1892.]

[31 Pac. 517.]

T. J. BRYAN, Plaintiff and Appellant, v. M. W. KALES,  
Defendant and Appellee.

1. PARTIES—MUST BE ADVERSARY PARTIES—CANNOT SUE SELF IN REPRESENTATIVE CAPACITY.—Adversary parties are essential in every cause. One may not sue himself. Neither may he sue himself in a representative capacity.
2. JUDGMENTS—COURTS OF RECORD—IMPORT VERITY—OMISSIONS—PRESUMPTION AS TO JURISDICTION.—A domestic judgment of a court of record, unless directly impeached, imports absolute verity as to every jurisdictional fact of which the record speaks, and is clothed

in the conclusive presumption that every jurisdictional fact exists of which the record may be silent.

3. **SAME—COLLATERAL ATTACK—PRESUMPTIONS—IDENTITY OF PERSONS CANNOT BE PRESUMED FROM IDENTITY OF NAMES.**—Where the judgment of a court of record that one M. W. Kales sued M. W. Kales, administrator, there is no presumption from the identity of names that there is identity of person, and such judgment is not open to collateral attack, it being on its face regularly entered in a cause of which the court had jurisdiction of the subject-matter, and presumptively of the parties.
4. **EJECTMENT—MORTGAGEE IN POSSESSION—PAYMENT OF DEBT CONDITION OF RECOVERY.**—Facts held to exist which constitute defendant a mortgagee in possession and that, so long as the mortgage debt remained unpaid, he could not be dispossessed.

GOODING, C. J., concurs on this ground alone.

**APPEAL** from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

Goodrich & Street, for Appellant.<sup>1</sup>

Baker & Campbell, and Clark Churchill, for Appellee.<sup>1</sup>

**SLOAN, J.**—This is a suit in ejectment brought by appellant in the district court of Maricopa County against appellee for the possession of the southeast  $\frac{1}{4}$  of section 2, township 1 north, range 3 east, Gila and Salt River meridian. There was a trial, and a judgment for appellee. From this judgment appellant brings his appeal. A brief summary of the facts proven will give an understanding of the questions presented by this appeal. It appears that on the twenty-eighth day of August, 1883, one Jonathan M. Bryan died intestate, leaving Vina Bryan his widow and sole heir; that on the twenty-fourth day of September, 1883, one M. W. Kales was appointed administrator of the estate of said deceased Bryan. It further appears that on the sixteenth day of October, 1883, in the district court of Maricopa County, in the suit of M. W. Kales vs. M. W. Kales, Administrator of the Estate of Jonathan M. Bryan, Deceased, and Vina Bryan, Defendant, a

<sup>1</sup> For briefs, see *Bryan v. Pinney*, ante, pp. 413-418.

judgment and decree foreclosing a mortgage of said premises, and ordering a sale of the same, was duly entered of record, The record of this judgment discloses that said mortgage was given to secure a certain promissory note executed by said deceased in favor of M. W. Kales for the sum of \$5,300.82; that said Vina Bryan, as the wife of said deceased, Bryan, joined in the execution of said mortgage. The record further disclosed that said Vina Bryan appeared in said case and filed an answer to the complaint in substance denying any individual indebtedness on her part, and disclaiming any right, title, or interest in the premises covered by the mortgage as in any way conflicting with the mortgage set forth in the complaint, and praying to be dismissed from said action. Thereupon judgment was entered in favor of said M. W. Kales against M. W. Kales, administrator as aforesaid, for the amount due on said note, and a decree entered for the sale of said mortgaged premises. It further appears that on the eleventh day of November, 1883, the said premises were sold by the sheriff to satisfy said mortgage, and that at said sale M. W. Kales became the purchaser thereof, paying the full market value of the land at the time and receiving a certificate of sale; that six months thereafter, there having been no redemption, the sheriff executed a deed to the same in the name of M. W. Kales as the grantee; that thereafter Kales went into possession of said premises, and has remained in possession ever since, paying taxes and making valuable and lasting improvements thereon. It further appears that said Vina Brown, the widow and sole heir of said Jonathan M. Bryan, deceased, by quitclaim deed dated 29th of June, 1887, conveyed such interest as she then had to appellant, T. J. Bryan, who thereupon brought this suit. The principal contention upon this appeal relates to the correctness of the ruling of the court upon the trial, permitting the introduction of the sheriff's deed and the judgment of foreclosure under which it was made, as evidence of title in the appellee; the appellant contending that the judgment was void upon the face of the record, and thus collaterally open to attack, for the reason that it showed that M. W. Kales, plaintiff, and M. W. Kales, defendant, were one and the same person. I am of the opinion that if upon the face of the record in the suit

of *Kales v. Kales, Admr.*, it appeared that M. W. Kales, plaintiff, was the same person as M. W. Kales, administrator, the judgment entered in said cause must be treated as utterly void, and no evidence of title in the purchaser under the foreclosure sale of the mortgaged premises made under it. That adversary parties are essential in every cause is fundamental. One may not sue himself any more than he may contract with himself. Neither may one sue himself in a representative capacity, for after all there is but one person before the court as plaintiff and defendant, and no refinement of reason can, without violence to common sense, and manifest absurdity, make it appear otherwise. The authorities, so far as I have investigated, are unanimous that no suit can be maintained by an individual against himself as an administrator of an estate. It is not the case of a trustee dealing with himself, which is sometimes permitted, but the altogether different question of a want of jurisdiction in the court to render a judgment without adversary parties before it.

It is settled doctrine that a domestic judgment of a court of record, unless directly impeached, imports absolute verity as to every jurisdictional fact of which the record speaks, and is clothed in the conclusive presumption that every jurisdictional fact exists of which the record may be silent. It is essential, therefore, to determine whether the record in the foreclosure suit of *Kales v. Kales, Admr.*, disclosed the fact that M. W. Kales, the mortgagee and plaintiff, was the same person as M. W. Kales, administrator and defendant, in said suit. It is strongly urged by the counsel for the appellant that this fact does appear upon the face of the record of that cause, inasmuch as it should be presumed alone from the similarity of names, applying the rule of evidence that identity of names is *prima facie* evidence of identity of person. An examination of authorities will show that this rule of evidence is not one of universal application; that it grew out of the general presumption in favor of the validity of contracts, the regularity of land titles, and the integrity of records; that, wherever its effect would be to negative these general presumptions, the reason of the rule ceasing to exist, the rule itself becomes inoperative; that hence it can have no application to a case like the one at bar, if, indeed, it applies at all to a

judgment of a court of record, where the effect of its application would be to impeach and destroy its effect as a valid and binding estoppel of record.

In the case of *Wilson v. Benedict*, 90 Mo. 209, 2 S. W. 283, the court held that where a petition recited that one James B. Melone was a member of the plaintiff firm, and that one James B. Melone was a member of the defendant firm, it was not to be assumed upon demurrer from that fact alone that they were the same person. The court in that case used this language. "The rule that from identity of name identity of person may be assumed has no application in this case, and cannot be extended so far as to uphold as an inference that, where a plaintiff sues a defendant having the same name as that of plaintiff, both persons were one and the same person." In *Prescott v. Tufts*, 7 Mass. 209, where the record disclosed that one James Prescott was the plaintiff and that the Hon. James Prescott was the judge before whom the case was tried, it was held that it will not be presumed from the identity of name that the two were the same person. In *Dorente v. Sullivan*, 7 Cal. 279, it was held that it was not to be presumed that an affidavit of service of summons was made before a party to the action, from the mere fact that the name of the plaintiff and the name of the justice of the peace before whom it was made were identical. In *Stevenson v. Murray*, 87 Ala. 442, 6 South. 301, it appeared that one Hugh Stevenson was an administrator of an estate. Under the statute of that state, which required in proceedings for the sale of lands belonging to a decedent's estate that the necessity for such sale be made to appear to the satisfaction of the court by the testimony of two disinterested witnesses, said administrator filed his petition for the sale of land belonging to the estate. The record of the proceedings showed that at the hearing of the petition the necessity for such sale was made to appear to the satisfaction of the court "by the oaths of Hugh Stevenson and August Lorenzen, disinterested witnesses." The court held, in an action to set aside an order for sale entered at the hearing of said petition, that it would not be presumed that the Hugh Stevenson who filed a petition as administrator was the same Hugh Stevenson who appeared as a witness at the hearing of said petition. The cases cited above are to my mind convin-

cing that the rule that identity of name is *prima facie* evidence of identity of person has no application where solemn records of a court of record would thereby be discredited and their integrity be impeached. The cases cited by counsel for appellant in their brief are not in conflict with this view, as an examination will show. The case of *Garwood v. Garwood*, 29 Cal. 515, much relied upon by counsel, is an altogether different case from any of the foregoing. In this case, parol evidence having been introduced to establish the identity of parties named in the record of the appointment of an administrator with the parties before the court in a suit involving the same subject-matter, the court stated that in their opinion the mere identity of names was *prima facie* sufficient to establish the identity of persons. The effect of the evidence was not to add to the record nor to vary or impeach it in any way, but merely to show the connection between it and the pending controversy, and the rule could, as suggested by the court, very well apply to such a case. To the same effect are the cases of *Thompson v. Manrow*, 1 Cal. 428, and *Campbell v. Wallace*, 46 Mich. 320, 9 N. W. 432. The cases of *Gitt v. Watson*, 18 Mo. 274, and *Jackson v. King*, 5 Cow. 239, 15 Am. Dec. 468, cited by counsel, are cases differing materially from the case at bar in this: that the rule *idem sonans* was invoked therein in aid of land title by showing the identity of a grantee in one instrument to be the same as the grantor in another instrument, or the identity of a patentee to land and the ancestor of one setting up title to the same. Aside from the consideration of the cases, there does not seem to be any sufficient reason why it should be presumed, from the mere similarity of names, that the court would entertain jurisdiction and enter its judgment in a case where both plaintiff and defendant are one and the same person, when, as a matter of fact, they may have been different persons. I am therefore of the opinion that the judgment in the case of *Kales v. Kales, Admr.*, was not open to attack in this action, it being upon its face regularly entered in a cause of which the court had jurisdiction of the subject-matter, and presumptively of the parties to the action.

This view of the law renders it unnecessary to pass upon the question whether the appearance of Vina Brown and her

answer in the case of *Kales v. Kales, Admr.*, constitutes an estoppel of record as to her. It is likewise unnecessary to discuss the effect of a contrary holding to the one above, as entitling the appellant to recover in this action. I may state, however, that in my opinion even were the judgment in the case of *Kales v. Kales, Admr.*, void upon its face, and there be no estoppel of record on the part of appellant's grantor, Vina Bryan, then that, in my judgment, all the facts exist which would constitute appellee a mortgagee in possession of the premises sued for, and that, therefore, so long as the mortgage debt remained unpaid, he could not be dispossessed.

The judgment is therefore affirmed.

Wells, J., concurs.

GOODING, C. J.—I concur in the affirmance of the judgment on the ground of the appellee being a mortgagee in possession.

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[Civil No. 331. Filed November 18, 1892.]

[31 Pac. 547.]

W. B. SLAUGHTER et al., Plaintiffs and Appellants, v.  
GEORGE MARLOW et al., Defendants and Appellees.

1. DAMAGES—MEASURE OF—ACTUAL COMPENSATION FOR LOSS.—In actions for breach of contract the circumstances of each case must determine what measure of damages should apply, having in view always the giving of actual compensation for actual loss.

2. SALES—BREACH OF CONTRACT—VENDOR'S REMEDIES—MEASURE OF DAMAGES.—For a breach of a valid contract of sale of chattels by the vendee, in failing to accept and pay the contract price, the vendor may treat the contract as a complete sale, and at his option, either store the goods as the property of the vendee, or within a reasonable time resell in the open market. If he hold the property for the vendee he may recover the full contract price. If he resells, the law deems him agent of the vendee, and he may apply the proceeds as payment *pro tanto*, and, if less than the contract price, recover the difference. He may also treat the contract as executory, and the sale as not having vested title in the vendee, and retain the property as his own, and may sue and recover any loss of profit had the contract price been paid. This would be the difference



between the contract price and the market value at the time and place of delivery.

3. **SAME—ELECTION OF REMEDY—RESALE—EVIDENCE—MEASURE OF DAMAGES—INSTRUCTIONS.**—Where the vendors plead they have resold the property and ask the difference between the contract price and the amount they have realized from the sale, they have elected their remedy, and must show the amount realized from the sale. The measure of damages is the difference between the contract price and the actual amount realized from the sale in excess of the necessary and proper expenses of the sale and the keep of the property, and an instruction that the measure of damages is the difference between the contract price and the market value at the time and place of delivery is error.
4. **APPEAL AND ERROR—REVIEW—FAILURE TO SAVE OBJECTION BELOW—WAIVED.**—Where appellee entered no default upon appellant's failure to answer his counterclaim below, and permitted evidence thereon to be admitted without objection, appellee may assign error as to matters arising upon such counterclaim as it is too late on appeal to obtain an advantage which might have been taken at the trial had the default been properly entered.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Reversed.

The facts are stated in the opinion.

Webster Street, for Appellants.

The vendor of personal property in a suit against a vendee for not taking and paying for the property has the choice ordinarily of either one of three methods of indemnifying himself:—

1. He may store or retain the property for the vendee and sue him for the entire purchase price.

2. He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on the resale.

3. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price. *Dustan v. McAndrew*, 44 N. Y. 72; Sedgwick on Damages, pp. 592, 596; 5 Lawson on Remedies, sec. 2629.

The defendants in their counterclaim elected the second

method. Having made their election it was error to allow them to show that the market price at Phenix at the time of the alleged breach was two cents per pound while the contract price was two and three quarter cents.

For this error the judgment should be reversed.

Baker & Campbell, for Appellees.

SLOAN, J.—Appellants, as partners doing business under the firm name of the Southwestern Dressed Beef Company, brought suit in the district court of Maricopa County against George Marlow and David Hardenburg, constituting the firm of Marlow & Hardenburg, to recover the sum of two thousand dollars, with interest. Appellants in their complaint alleged that said sum had been advanced to said Marlow & Hardenburg under a contract for the purchase of certain beef steers which were to be delivered to said appellants at a future time at an agreed price per pound. They further alleged that said Marlow & Hardenburg wholly failed and refused to deliver said cattle, or any of them, and to carry out the terms of their contract. The appellees, Marlow & Hardenburg, by way of counterclaim, answered that they were ready and willing to deliver said cattle at the time and place agreed upon, but that appellants refused to accept the same as agreed, and failed to pay the contract price therefor, except said sum of two thousand dollars; that, in consequence of appellants' failure and refusal to accept and pay for the cattle, appellees were compelled to and did sell said cattle in open market, realizing, as the highest and best price at the time of sale, the net sum of \$4,948.11. They prayed for damages against appellants for said breach of contract in the sum of \$6,036.39; said sum being the difference, as alleged, between the contract price and the amount realized from said sale, deducting the expenses of the sale and the keep of the property after the alleged breach and before sale. The case was tried by a jury, and a verdict and judgment entered for appellees upon their counterclaim in the sum of \$941.12. Appellants moved for a new trial, which was overruled. From this ruling and from the judgment they appealed.

The principal assignment of error relates to the proper measure of damages for the breach of the contract claimed by

appellees in their counterclaim. The court permitted appellees to prove, over objection, the market value of the cattle at the time and place when the delivery was by the terms of the contract to be had, and instructed the jury subsequently, in effect, that, if they found that the appellees were entitled to recover for a breach of the contract, the measure of damages would then be the difference between the contract price and the market value at time and place of delivery. In actions for breaches of contract the circumstances of each case must determine what measure of damages should apply, having in view always the giving actual compensation for actual loss. For a breach of a valid contract of sale of chattels by the vendee, in failing to accept the property and pay the contract price, the vendor may treat the contract as a complete sale, and, at his option, either retain or store the property as the property of the vendee, or within a reasonable time resell the property in open market. He may also treat the contract as executory, and the sale as not having vested title in the vendee, and retain the property as his own. If the vendor chooses to treat the sale as complete, and hold the property for the vendee, he may recover the full contract price. If he chooses to treat the sale as complete, and resells the property in open market within a reasonable time, the law deems him the agent of the vendee for that purpose, and he may apply the proceeds as a payment *pro tanto*, and recover the difference between the contract price and the amount realized at the sale, provided it be less than the contract price. If, however, the vendor chooses to treat the sale as wholly executory, and retains the goods as his own, he may sue and recover any loss of profit he would have made had the contract been fully executed, and the contract price paid. This would be the difference between the contract price and the market value at the time and place of delivery. *Dustan v. McAndrew*, 44 N. Y. 72. In this case the appellees allege in their counterclaim that they resold the property to another, in open market, and ask that they be permitted to recover the difference between the contract price and the amount realized from the sale. In addition, the proof shows a resale of the property by the vendors, Marlow & Hardenburg. We are of the opinion, therefore, that the appellees should be held to have elected

this method for indemnifying themselves for the loss occasioned by the breach of contract, and should have been required to show, before recovering, the amount realized from the sale. The measure of damages would then have been the difference between the contract price and the actual amount realized from such sale in excess of the necessary and proper expenses of the sale and the keep of the steers. Counsel for appellees, in their brief, contend that, inasmuch as no answer was filed to their counterclaim, appellants were therefore in default, and could not be heard to complain of the ruling of the court as to the proper damages for the breach of contract set up in said counterclaim. This position is untenable, for, even if an answer be required, under our practice, to a counterclaim, still the appellees took no default in the action, but permitted the appellants, without objection to introduce proof upon the issues raised by said counterclaim. It is now too late to obtain an advantage which might have been taken at the trial, had the default been properly entered. For the reasons stated the judgment will be reversed, and the cause remanded for a new trial.

Gooding, C. J., and Wells, J., concur.

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[Civil No. 325. Filed November 18, 1892.]

[31 Pac. 519.]

T. J. BRYAN, Plaintiff and Appellant, v. GEORGE T. BRASIUS et al., Defendants and Appellees.

1. JUDGMENTS—IDENTITY OF NAMES OF PARTIES—PRESUMPTION IN FAVOR OF REGULARITY OVERCOMES PRESUMPTION OF IDENTITY OF PERSON ARISING FROM IDENTITY OF NAME.—The presumption in favor of the regularity and validity of the proceedings of a court of general jurisdiction is sufficiently strong to overcome the presumption of identity of person, arising from identity of name in a judgment or decree, where the same is offered in evidence.
2. SAME—COLLATERAL ATTACK—ADMISSION OF INVALIDITY.—In an action seeking to eject parties holding under judgment of foreclosure,  
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it is competent for the parties to admit that the plaintiff and defendant in the foreclosure proceedings were one and the same party.

3. SAME—FORECLOSURE—IDENTITY OF PERSONS—PURCHASERS NOT CHARGEABLE WITH NOTICE FROM IDENTITY OF NAME—PRESUMPTIONS.—Where purchasers under judgment of foreclosure have no actual knowledge or notice that the plaintiff and defendant in the foreclosure proceedings were one and the same party, they are not chargeable with notice of the identity of person as there is no presumption of identity of person from identity of name, where a judgment of a court of general jurisdiction shows the same name as plaintiff and defendant.
4. SAME—ESTOPPEL OF RECORD—ADVERSE PARTIES—PARTY SUING HIMSELF AS ADMINISTRATOR—JUDGMENT INVALID.—For a judgment to operate as an estoppel there must be adverse parties. A man in his individual capacity, suing himself as administrator, does not obtain a judgment which he can set up as an estoppel, nor can he take title under such judgment.  
SLOAN, J., dissenting, upon the ground that under the facts the judgment in *Kales v. Kales, Admr.*, constituted an estoppel of record.
5. EJECTMENT—RIGHT OF POSSESSION BASIS—MORTGAGES—MORTGAGEE IN POSSESSION—PURCHASERS UNDER INVALID JUDGMENT—PAYMENT OF DEBT CONDITION OF RECOVERY.—The action of ejectment is based on the right of possession. When it appears that plaintiff's testator mortgaged the premises to one Kales, who in his individual capacity sued himself as administrator of the mortgagor and bought the land under order of sale made under the decree of the court therein, the grantees of Kales, being in possession will be subrogated to Kales' rights under the mortgage and be held mortgagees in possession, and entitled to remain in possession till the debt and requirements of equity are fully met.
6. SAME—MORTGAGOR AGAINST MORTGAGEES IN POSSESSION—LIMITATION OF ACTIONS—BAR DOES NOT AFFECT PAYMENT OF DEBT AS CONDITION OF RECOVERY.—In an action of ejectment against mortgagees in possession the plea that the debt secured by the mortgage is barred by the statute of limitations will not avoid the necessity of paying the debt as a condition to the recovery of possession.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

Goodrich & Street, for Appellant.<sup>1</sup>

<sup>1</sup> For briefs. see *Bryan v. Pinney*, *ante*, pp. 413-418.

Clark Churchill, for Appellees.<sup>1</sup>

GOODING, C. J.—This is an action of ejectment brought by appellant, as plaintiff in the court below, against appellees, to recover possession of the northeast quarter of section 5, township 1 north, range 3 east, Gila and Salt River meridian. The answer was “Not guilty” and facts in estoppel hereafter set out. In stating the case, I shall endeavor to set out briefly all the facts necessary to fairly present the issues of law and fact. The real estate in question was the property of one J. M. Bryan in his lifetime. At his death he left his widow, Vina Bryan, his sole heir, to whom the real estate descended and belonged, if not diverted by the proceedings hereinafter mentioned. Vina Bryan subsequently became Vina Brown by marriage. The property was community property. After the death of J. M. Bryan, M. W. Kales became the administrator of the estate. While administrator, M. W. Kales brought an action on a note and mortgage to secure the same, executed by J. M. Bryan, against M. W. Kales, as administrator of the estate of J. M. Bryan, deceased, to foreclose the said mortgage. The note was for twenty-five hundred dollars, and the mortgage was on the property above described. A decree was entered in said action in the district court, and in pursuance thereof the said property was sold, the plaintiff being the purchaser. Vina Bryan was not a party to this action nor to the note or mortgage, nor was there any other defendant save M. W. Kales. In short, M. W. Kales in his individual capacity brought the suit against himself in his capacity as administrator of the estate of J. M. Bryan, deceased; had summons issued and served upon himself; appeared to the action, and admitted the complaint; got an order of sale, and became the purchaser, paying to the estate the full value of the property, and the estate received the full benefit thereof. Said Kales received a certificate of purchase. He subsequently sold the certificate to one J. T. Sims, who afterwards received a sheriff’s deed, and went into possession, and paid taxes and made lasting and valuable improvements. Sims subsequently sold the same to Brasius for a much larger sum than Kales or Sims had paid. Brasius was in possession at the time this action was commenced. Sims did not know that

<sup>1</sup> For briefs, see *Bryan v. Pinney*, ante, pp. 413-418.

Kales plaintiff in the foreclosure proceedings and Kales administrator defendant were one and the same person, unless that knowledge or notice was imparted by the record showing identity of name of plaintiff and defendant, nor did Brasius have any more knowledge or notice of that fact than the record so imparted. That such was the fact, however,—that is, that Kales plaintiff and Kales defendant were one and the same person,—is admitted in the statement of facts in this case. This action of foreclosure, above mentioned, was in the district court in and for Maricopa County. The premises in question were never sold or distributed by any probate court proceedings. Long before the commencement of this action the estate of J. M. Bryan had been fully administered, and the administrator discharged. After said discharge Vina Bryan, then Vina Brown, for one dollar, granted, conveyed, remised, released, and forever quitclaimed the land in controversy to plaintiff, appellant.

It is claimed on the part of the appellant that the proceedings and decree in the foreclosure were void, and the sale thereunder, because Kales was both plaintiff and defendant; and a large number of cases are cited to sustain that contention. These cases when examined are not, I think, in point. They express the proposition that a man cannot sue himself. Other cases are cited to the effect that identity of name is evidence of identity of person. Coupling these two propositions, it is argued that the decree in the case *Kales v. Kales* is void, and all proceedings thereunder; but there is no case cited wherein, on the face of the pleadings and decree, the court has held in a collateral proceeding the judgment or decree to be void, because of the identity of name of the plaintiff and defendant. That identity of name is *prima facie* evidence of identity of person is abundantly established by the cases cited; but the cases do not involve the judgment or decree of a court of general jurisdiction, where the same is offered in evidence in a collateral proceeding. They are cases where the rule may well be applied. They are cases where the name of a grantee subsequently appears as a grantor in a chain of title and like cases. In such cases clearly the rule may well be applied, that identity of name is *prima facie* evidence of identity of person. They are not cases where the parties occupy adverse

relations, and where the proceedings have passed to judgment. The presumption of the regularity and validity of the proceedings of courts of general jurisdiction is sufficiently strong, in my opinion, to overcome the presumption of identity of person, arising from identity of name in a judgment or decree where the same is offered in evidence. But in this case it is admitted (in the statement of facts) that Kales plaintiff and Kales defendant were one and the same person. This I think an admission that it was competent for the parties to make, and must therefore bind them in this case, for whatever force and effect it may have. Whether this fact could have been proved by parol, if objection had been made, does not arise in this case, as the fact was admitted, as appears by the statement of facts.

With this admission in the record, the question arises, what effect does it have on the rights of Brasius, as a purchaser through Kales and Sims? It is also in the statement of facts that neither Sims nor Brasius had any knowledge or notice of the fact that Kales plaintiff and Kales defendant were one and the same person, unless the record imparted such notice or knowledge. As there is no presumption of identity of person from identity of name, where a judgment or decree of a court of general jurisdiction shows the same name as plaintiff and defendant, I think neither Sims nor Brasius chargeable with notice of the identity of person. In other words, they are innocent purchasers, so far as purchasers at a judicial sale can be. But does that give them title as against Vina Brown's grantee? If the decree itself was void, or if it was such a decree that it could not operate as an estoppel as against the sole heir of Vina Brown, what right or title did Sims or Brasius get as against the grantee of Vina Brown? That Kales could not himself have claimed title to the property by virtue of the foreclosure proceedings alone, as against Vina Brown, I think is quite clear, unless I should hold that a man can in his individual capacity sue himself in his representative capacity as administrator, and obtain a decree that would bind and estop the heirs. For a judgment or decree to operate as an estoppel I think there must be adverse parties, and that a man in his individual capacity, suing himself as administrator, does not obtain a judgment or



decree that he can set up as an estoppel against any one, nor can he take title under such a judgment or decree. They may be facts *in pais* that would operate in connection with such proceedings to protect his possession, and perhaps inure title in time, but no title by virtue of the proceedings alone.

But it is contended that Sims and his grantee, Brasius, are innocent purchasers, and therefore took title to the property, and should be protected as owners. If the court had no power to make the decree, and there were no facts *in pais*, of course no title could be acquired by any one. If the decree did not bind Vina Bryan, and no act or failure to act on her part operated as an estoppel *in pais*, would Sims or Brasius occupy any better position in law than one who buys a title to real estate apparently faultless on the face of the records, but subject to the fatal infirmity of a forged deed or power of attorney in the chain of title? A party must have his day in court, or he is not bound by the proceedings, however innocent (if we may use that term in such connection) the purchaser may be who seeks to deraign title thereunder. Of course, if the title still remained in Vina Bryan or Vina Brown, she could convey it to her grantee. If the case stopped here, I would think the decree below should be reversed. But the facts in the case disclose an indebtedness of twenty-five hundred dollars to Kales from T. J. Bryan, and a mortgage to secure the same on the property in dispute, a proceeding in court, in good faith and without fraud on the part of Kales or any one, to foreclose the mortgage, (the proceeding thought to be valid and regular on its face,) a sale under the decree of the court, and possession taken in pursuance thereof, and taxes paid and valuable and lasting improvements made by the purchaser and his grantees. The plaintiff brings suit by action of ejectment. He does not pay or offer to pay the mortgage debt. In this territory the action of ejectment is based upon the right of possession. I think, on the very best of authority and the highest equity, the defendant must be held to be the mortgagee in possession, and subrogated to the rights of Kales under his mortgage, and entitled to remain in possession till the requirements of equity are fully met. On this proposition it is only necessary to refer to the following authorities: *Cooke v.*

*Cooper*, 18 Or. 142, 17 Am. St. Rep. 709, 22 Pac. 945; *Jackson v. Minkler*, 10 Johns. 479; *Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 58; *Van Duyne v. Thayer*, 14 Wend. 233.

But it is claimed by appellant that the debt secured by the mortgage was barred by the statute of limitations at the commencement of this action, and therefore need not be paid. I do not think a court of equity would ever allow the statute to have that effect. It would be so inequitable and shocking to all sense of right that a court exercising equitable powers, as this court does, and recognizing equitable defenses in an action of ejectment, would never disturb the possession of a mortgagee in peaceable and quiet enjoyment under legal proceedings, valid or invalid, until the mortgage debt was paid and all other requirements of equity fully met. If the decision in this case rested solely on this last proposition, the case should perhaps be remanded for an accounting, etc. But as a majority of this court think the judgment of the court below should be affirmed on other grounds as well, the judgment of the court below will simply be affirmed.

WELLS, J.—I concur in the judgment.

SLOAN, J.—While concurring in the judgment, I am unable to concur in the view that the judgment in the case of *M. W. Kales v. M. W. Kales, Admr.*, does not constitute an estoppel of record binding upon appellant herein. I hold that the rule of evidence that from identity of name identity of person is to be presumed has no application to a judgment of a court of general jurisdiction, where the effect of such application would be to destroy the presumption of the regularity of such judgment. If this be true, I think the judgment in the case of *Kales v. Kales, Admr.*, was not void upon its face and open to attack in this action. At the oral decision of this cause I expressed a different view from this, but subsequent reflection and a further examination of the authorities has led to the conclusion reached and expressed by me in *Bryan v. Kales, ante*, p. 423, 31 Pac. 517, (decided at this term).



# MEMORANDUM DECISIONS.

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[Civil No. 276.]

**TERRITORY OF ARIZONA, Appellee, v. THE PERSONS, ASSOCIATIONS, CORPORATIONS, FIRMS, COMPANIES, and REAL ESTATE, LANDS and PROPERTY described in the Delinquent Tax List of the County of Mohave for the year 1888. Appeal of ATLANTIC AND PACIFIC RAILROAD COMPANY, Appellant.**

**APPEAL** from the District Court of the Third Judicial District in and for the County of Mohave. James H. Wright, Judge.

William C. Hazledine, Solicitor, and J. A. Williamson and E. M. Sanford, for Appellant.

Clark Churchill, Attorney-General, and William G. Blakely, for Appellee.

January 13, 1892. Dismissed on stipulation.

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[Civil No. 282.]

**TERRITORY OF ARIZONA, Appellee, v. THE PERSONS, ASSOCIATIONS, CORPORATIONS, FIRMS, COMPANIES, and REAL ESTATE, LANDS and PROPERTY described in the Delinquent Tax List of the County of Apache for the year 1888. Appeal of ATLANTIC AND PACIFIC RAILROAD COMPANY, Appellant.**

**APPEAL** from the District Court of the Third Judicial District in and for the County of Apache. James H. Wright, Judge.

William C. Hazledine, Solicitor, and J. A. Williamson and E. M. Sanford, for Appellant.

Clark Churchill, Attorney-General, and A. F. Banta, for Appellee.

January 13, 1892. Dismissed on stipulation.

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[Civil No. 339.]

R. E. FARRINGTON, Appellant, v. BYRON JACKSON, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa.

C. F. Ainsworth, for Appellee.

January 21, 1892. Affirmed.

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[Criminal No. 69.]

Ex Parte: In the Matter of J. J. SMITH, Petitioner. Habeas Corpus.

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai. Application for writ of habeas corpus.

Robert Brown, for Petitioner.

January 30, 1892. Dismissed for want of prosecution.

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[Criminal No. 74.]

Ex Parte: In the Matter of WILLIAM VARNUM, Petitioner. Habeas Corpus.

APPLICATION for Writ of Habeas Corpus.

G. C. Israel, for Petitioner.

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Thos. F. Wilson, U. S. District Attorney, for Respondent.

February 9, 1892. Writ denied.

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[Civil No. 344.]

**AH YOU**, Appellee, v. **DON YEN**, Appellant.

**APPEAL** from the District Court of the First Judicial District in and for the County of Pima. **R. E. Sloan**, Judge.

**Barnes & Martin**, for Appellant.

**C. W. Wright**, for Appellee.

September 29, 1892. Dismissed.

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[Civil No. 232.]

**H. D. UNDERWOOD**, Appellant, v. **THOMAS HUGHES**, Auditor, Appellee.

**APPEAL** from the District Court of the Third Judicial District in and for the County of Yavapai. **James H. Wright**, Judge.

**E. M. Sanford**, for Appellant.

**William Herring**, Attorney-General, for Appellee.

September 29, 1892. Dismissed.

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[Civil No. 315.]

**SCHOOL DISTRICT NUMBER ONE OF COUNTY OF YUMA**, Appellant, v. **CAROLINE E. REMBERT**, Appellee.

**APPEAL** from the District Court of the Second Judicial District in and for the County of Yuma. **Joseph H. Kibbey**, Judge.

Samuel Purdy, W. H. Barnes, and J. H. Martin, for Appellant.

L. H. Hawkins, J. B. Woodward, and G. M. Knight, for Appellee.

September 30, 1892. Affirmed.

(Note by Reporter.—The record shows, "Opinion filed," but none appears in the records of the office of the clerk of the supreme court.)

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[Civil No. 335.]

FRANK BROAD et al., Appellants, v. LOUIS VIDAL, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. R. E. Sloan, Judge.

C. G. Johnson, and Barnes & Martin, for Appellants.

Allen R. English, for Appellee.

September 30, 1892. Modified.

(Note by Reporter.—The record shows, "Opinion filed," but none appears in the records of the office of the clerk of the supreme court.)

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[Civil No. 308.]

W. A. CLARK, Appellant, v. F. M. MURPHY, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge.

Herndon & Hawkins, and E. M. Sanford, for Appellant.

Baldwin & Johnston, for Appellee.

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(Note by Reporter.—The record shows, "Opinion filed," but none appears in the records of the office of the clerk of the supreme court.)

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2. **SAME—ASSIGNMENTS OF ERROR—FUNDAMENTAL ERROR—REV. STATS. ARIZ. 1887, PAR. 937, CITED.**—The rule that in the absence of an assignment of errors the judgment will be affirmed or the appeal dismissed applies only when the error is not fundamental. Where the error appears on the face of the record as a demurrer to the complaint, and goes to the right of the plaintiff to maintain the action, it must be considered though it be not assigned. Statute, *supra*, cited. *Gila R. I. Co. v. Wolfley*, *ante*, p. 176, 24 Pac. 257; *Putnam v. Putnam*, *ante*, p. 182, 24 Pac. 320, limited; *United States v. Tidball*, *ante*, p. 384, 29 Pac. 385, cited. (*Keyser v. Shute*, 336.)
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10. **APPEAL AND ERROR—BILL OF EXCEPTIONS—WHAT CONSTITUTES.**—A paper purporting to be an agreed statement of the case, if presented to the trial judge, and by him settled and signed, as required by the statutes, and filed within the time allowed, can be considered a bill of exceptions, under authority of *Putnam v. Putnam*, ante, p. 182, 24 Pac. 320. (Smith v. Blackmore, 348.)
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13. **APPEAL AND ERROR—BOND—JURISDICTION—REQUISITES—REV. STATS. ARIZ. 1887, PAR. 859, CONSTRUED.**—The execution and filing of a proper appeal bond is prerequisite to the appellate jurisdiction of this court. Where it fails to conform substantially to the statute, *supra*, names no obligee, is not in a sum at least double the probable amount of costs in both the appellate and lower courts, and is not conditioned that the appellant shall prosecute his appeal with effect, the appeal will be dismissed. (Reilly v. Crowley, 286.)
14. **APPEAL AND ERROR—BOND—SUFFICIENCY—UNDERTAKING—JURISDICTION—REV. STATS. ARIZ. 1887, SEC. 859, CH. 20, TITLE 15, CITED AND CONSTRUED.**—If an undertaking, filed in lieu of the bond on appeal required by the statute, *supra*, complied with its requirements necessary to give this court jurisdiction, the form might be disregarded. Where such undertaking is not made payable to the appellee, nor to any one, and only undertakes to pay all damages and costs which may be awarded against him on appeal not exceeding three hundred dollars, and is not conditioned that appellant will prosecute his appeal with effect, it does not comply substantially with the statute, *supra*, and the appeal must be dismissed. (Johnston v. Letson, 344.)
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  21. **SAME—MOTION FOR NEW TRIAL—MUST BE SIGNED BY PARTY OR ATTORNEY—REV. STATS. ARIZ. 1887, PAR. 834, CITED.**—Motion for new trial is required by statute, *supra*, to be signed by party or his attorney. (Miller v. Green, 205.)
  22. **APPEAL AND ERROR—CONFLICT IN EVIDENCE.**—Where there is a conflict in the evidence the appellate court will defer to the conclusion reached by the court below. (Territory v. Flores, 215.)
  23. **SAME—TRANSCRIPT OF THE EVIDENCE—BILL OF EXCEPTIONS—STATEMENT OF FACTS—REV. STATS. ARIZ. 1887, PAR. 1739, 1740, 1744, PENAL CODE, CITED.**—A transcript of the reporter's shorthand notes filed and approved by the judge fifty-five days after the motion for new trial was overruled cannot be taken either as a bill of exceptions, it not having been presented to the judge for his allowance and signature within ten days after the conclusion of the trial, par. 1739, *supra*, no order for an extension of time appearing of record, par. 1744, *supra*, and it not having been presented to the district attorney as provided by par. 1740, *supra*; or as a statement of facts, the provisions of the law for making up a statement of facts being similar. (Territory v. Flores, 215.)
  24. **APPEAL AND ERROR—CONFLICTING EVIDENCE—VERDICT OF JURY.**—Where there is any conflicting evidence, although it may greatly preponderate against the verdict of a jury, appellate courts will not interfere. (Territory v. Kay, 92.)

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**APPEAL AND ERROR (Continued).**

25. **SAME—RECORD—BILL OF EXCEPTIONS—REPORTER'S NOTES—ERRORS OF LAW REVIEWED.**—In absence of bill of exceptions or statement of facts, this court will not review the evidence. What purports to be the reporter's notes, without even his affidavit annexed, is insufficient, and was not intended as a substitute for a bill of exceptions or a statement of facts. Manifest errors of law should be corrected, even without a bill or statement. (*Territory v. Kay*, 92.)
26. **APPEAL AND ERROR—DEFECTIVE RECORD—REV. STATS. ARIZ. 1887, P. 185, PAR. 842, CITED—OBJECTIONS RAISED FOR FIRST TIME ON APPEAL WILL NOT BE CONSIDERED.**—Where the record contains neither motion for new trial, exceptions to the findings, exceptions to conclusions of law, statements of facts, nor bill of exceptions, there is no question presented for the consideration of an appellate court. The assignment of errors cannot be considered as the objections raised thereby are made here for the first time. (*Santa Rita etc. Co. v. Mercer*, 181.)
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29. **SAME—SAME—APPELLATE COURT MAY AFFIRM OR DISMISS.**—In the absence of an assignment the court may either affirm the judgment of the court below or dismiss the appeal. (*Wolfley v. Gila River Irrigation Co.*, 176.)
30. **SAME—SAME—PRACTICE—OBJECTION AT HEARING TREATED AS MOTION TO DISMISS.**—The objection having been made by the appellee at the hearing of the case, this may be taken as a motion to dismiss the appeal. (*Wolfley v. Gila River Irrigation Co.*, 176.)
31. **SAME—RECORD—OMISSIONS—STATEMENT OF FACTS—BILL OF EXCEPTIONS—TIME OF PRESENTATION.**—Where there are numerous omissions to comply with the statutory provisions regulating appeals, no statement of facts, no bill of exceptions, preserved to the ruling upon the motion for new trial, and nothing in the record to show whether the bill of exceptions prepared, which was not settled till ninety days after the trial, was presented within ten days after the trial or filed within the term, the appeal will be dismissed. (*Wolfley v. Gila River Irrigation Co.*, 176.)

## APPEAL AND ERROR (Continued).

32. **APPEAL AND ERROR—INCOMPETENT TESTIMONY—TRIAL BY COURT—PRESUMPTIONS—HARMLESS ERROR.**—In an appeal from a trial before the court, the court of last resort will look into the record to see if the conclusion is right after disregarding the incompetent testimony, assuming that the trial judge did not consider the same. Harmless error is not ground for reversal. (Boston and Arizona etc. Co. v. Lewis, 5.)
33. **SAME—WEIGHT OF EVIDENCE.**—Where there is competent evidence in a case to sustain the conclusions this court cannot consider its weight; that is for the trial court. (Boston and Arizona etc. Co. v. Lewis, 5.)
34. **APPEAL AND ERROR—JURISDICTION—BOND—REV. STATS. ARIZ. 1887, PAR. 849, CITED—FILING—END OF TERM—COMPARE LOSE V. DORAN, POST, P. 284, 73 PAC. 443—MUST APPEAR OF RECORD—BOND—ESSENTIALS—REV. STATS. ARIZ. 1887, PAR. 863, CITED—ORDER OF COURT FIXING AMOUNT VOID.**—Paragraph 849, *supra*, requires that an appeal bond, or affidavit, be filed within twenty days after the expiration of the term at which judgment was rendered. The transcript should show affirmatively the date of adjournment of the term. Compare *Lose v. Doran, supra*. Presumptions cannot supply omissions therein of facts essential to the jurisdiction. The bond must describe the judgment appealed from, name all the parties thereto, and be payable to appellee in double the amount of the judgment and costs—paragraph 863, *supra*. An order of court fixing the amount of such bond is void. (Putnam v. Putnam, 182.)
35. **SAME—ASSIGNMENT OF ERRORS—FORM—REV. STATS. ARIZ. 1887, PAR. 940, CITED—NECESSITY FOR—IN ABSENCE OF MAY DISREGARD ERRORS AND AFFIRM OR DISMISS.**—Paragraph 940, Revised Statutes, requires the filing of assignment of errors. It should be a separate paper, signed by the party or his attorney, and filed with the clerk below before the appellant withdraws the transcript, and a copy should be attached thereto. This court is not bound to notice errors not properly assigned, and ordinarily may affirm the judgment or dismiss the appeal. (Putnam v. Putnam, 182.)
36. **SAME—MOTION FOR NEW TRIAL—PRACTICE TO OBTAIN—REVIEW OF RULING UPON—REV. STATS. ARIZ. 1887, PARS. 833, 593, CLAUSE 2, 834, 842—DALTON V. RENTARIA, 2 ARIZ. 275, 15 PAC. REP. 37, CITED.**—The only method by which to obtain a new trial is by motion therefor to the trial court, and, upon an adverse ruling, by appeal from that ruling. This court cannot consider any error which would be cause for a new trial unless a motion therefor upon that ground has been made to the court below, and such motion overruled, the ruling excepted to, and the motion embodied in a bill of exceptions, and the ruling properly assigned as error. (Putnam v. Putnam, 182.)



## APPEAL AND ERROR (Continued).

37. **SAME—SAME—RULING—EXCEPTIONS—HOW BROUGHT INTO RECORD—**PAR. 842, REV. STATS. ARIZ. 1887, CITED.—**MINUTE ENTRIES—BILL OF EXCEPTIONS—WHEN UNNECESSARY—**PAR. 827 CITED.—Paragraph 842, Revised Statutes of Arizona, 1887, requires the motion for new trial, ruling, and exceptions to be brought into the record by a bill of exceptions. The minute entries by the clerk reciting the motion, ruling, and exception cannot serve this purpose. Paragraph 827 provides that where the ruling or other action of the court appears otherwise of record, a bill of exceptions shall not be necessary. (Putnam v. Putnam, 182.)
38. **SAME—RECORD—WHAT CONSTITUTES—**REV. STATS. ARIZ. 1887, PARS. 810, 832, 844, 845, 849, 874, 875, CITED.—The statutes, *supra*, prescribe what shall constitute the record. (Putnam v. Putnam, 182.)
39. **SAME—BILL OF EXCEPTIONS—PURPOSE OF—COMPLIANCE WITH STATUTE.**—The purpose of a bill of exceptions is to incorporate into the record as facts the action of the trial court complained of, and the objection thereto. The requirements of the statute that they shall be prepared within a specified time, presented to the trial judge, who shall after submitting them to the opposite party, if correct, sign them, cannot be dispensed with. (Putnam v. Putnam, 182.)
40. **SAME—STATEMENT OF FACTS—**REV. STATS. ARIZ. 1887, PARS. 843, 845, CITED.—**TIME FOR FILING.**—Where the record fails to show that a paper purporting to be a statement of facts was filed in term time or within thirty days thereafter it must be disregarded. (Putnam v. Putnam, 182.)
41. **SAME—SAME—CONTENTS.**—The statement of facts must affirmatively show that it contains all the facts admitted, those agreed to have been proved, and the evidence of those disputed. (Putnam v. Putnam, 182.)
42. **SAME—ERRORS—HOW MADE PART OF RECORD.**—Exceptions to rulings upon admission or rejection of evidence may be saved by being included in statement of facts, provided rules governing bills of exceptions have been observed. Rulings upon motions and the like and exceptions thereto must be embodied in bills of exceptions. Every matter not otherwise made by statute a matter of record must be made so by a statement of facts or bill of exceptions to present it for review. (Putnam v. Putnam, 182.)
43. **APPEAL AND ERROR—JURISDICTION—MOTION FOR NEW TRIAL—FAILURE TO FILE IN TIME.**—This court has no jurisdiction to reverse the judgment of the trial court, appellant not having his motion for a new trial disposed of at the term when the judgment was rendered and not having executed his bond on appeal within twenty days of the close of the term. (Doran v. Lose, 284.)

## APPEAL AND ERROR (Continued).

44. SAME—PRESUMPTIONS—END OF TERM—COMPARE *PUTNAM v. PUTNAM*, ANTE, P. 182, 24 PAC. 321.—This court takes judicial notice of the fact that presumptively a term of court ends on the day prior to the beginning of a new term. (*Doran v. Lose*, 284.)
  
45. APPEAL AND ERROR—JURISDICTION—STATUTORY CONSTRUCTION—FINAL JUDGMENTS—AMOUNT IN CONTROVERSY—REV. STATS. U. S., 1878, SEC. 1869, CONSTRUED, SEC. 1874 CONSTRUED, SEC. 1910 CITED, SEC. 1865 CITED, TITLE 23 CITED; SUPP. REV. STATS. U. S. 1891, P. 893, SEC. 5, CH. 131, CITED; REV. STATS. ARIZ. 1887, PARS. 592, 593, 846 CONSTRUED; PARS. 3275, 3276, 3280 CITED; COMP. LAWS ARIZ. 1877, SECS. 2339, 2340, CITED—*BISHOP v. PERRIN*, ANTE, P. 350, 29 PAC. 648, CITED AND APPROVED.—Section 1869, Rev. Stats. U. S., providing that "writs of error, bills of exceptions, and appeals shall be allowed from the final decisions of the district courts to the supreme courts of all the territories, respectively, under such regulations as may be provided by law," refers only to "district courts" created by the organic act, which are those vested with the same jurisdiction in certain cases as the circuit and district courts of the United States. It does not refer to territorial district courts established under sec. 1874, Rev. Stats. U. S., which have their existence by virtue of the acts of the territorial legislature. Their jurisdiction and the right and the manner of appeal from their judgments are defined solely by the legislature. Paragraphs 846, 592, and 593, Rev. Stats. Ariz. 1887, sections of the same code defining jurisdiction on appeals are irreconcilable. Where a commission for the revision of a code has been appointed by the legislature the entire code pertaining to a particular subject will be construed as adopted and approved the same day though in fact approved at different times. In such revision where paragraph 846 gives the right of appeal in all cases, and paragraph 592 limits the right, the construction will be in favor of the enlarged rather than the limited right, and, therefore, an appeal from the final judgment of the district court in all cases will be allowed. Upon such appeal the matters to be reviewed are to be governed by paragraph 593. (*History Co. v. Dougherty*, 387.)
  
46. APPEAL AND ERROR—MOTION FOR NEW TRIAL—ASSIGNMENTS OF ERROR—SUFFICIENCY—REVIEW OF EVIDENCE.—The motion for new trial assigns as reason therefor, "The verdict is contrary to the law and the evidence," and the ninth assignment of error is, "The court erred in overruling the motion of defendant for a new trial for reasons stated in the motion." This brings the evidence before us for consideration. Evidence reviewed and held sufficient to support the judgment. (*Territory v. Shankland*, 403.)
  
47. APPEAL AND ERROR—MOTION FOR NEW TRIAL—MUST BE DETERMINED DURING TERM WHEN MADE—PAR. 837, REV. STATS. ARIZ. 1887, CITED AND HELD MANDATORY.—Statute, *supra*, is mandatory and requires

## APPEAL AND ERROR (Continued).

that a motion for new trial be determined at the term when the motion is made. If not it is discharged by operation of law at the end of the term. (*Hand v. Ruff*, 175.)

48. SAME—JURISDICTION—NOTICE OF APPEAL—BOND—DISMISSAL FOR WANT OF JURISDICTION.—Notice of appeal must be given during the term and the bond on appeal must be filed within twenty days after the term at which final judgment is rendered to give this court jurisdiction. Where failure to comply with these requirements appears of record the appeal must be dismissed for want of jurisdiction. (*Hand v. Ruff*, 175.)
49. APPEAL AND ERROR—MOTION FOR NEW TRIAL—NECESSITY FOR REVIEW OF EVIDENCE—PUTNAM v. PUTNAM, ANTE, P. 182, 24 PAC. 320, FOLLOWED.—Error in admission of evidence is good ground for a new trial, and it not appearing from the record that any motion for new trial was made in the court below that alleged error is not before us for consideration. *Putnam v. Putnam*, *supra*, followed. (*Greer v. Richards*, 227.)
50. APPEAL AND ERROR—MOTION FOR NEW TRIAL—TIME FOR FILING—REV. STATS. ARIZ. 1887, PAR. 836, CITED.—Statute, *supra*, requires the filing of motion for new trial within two days after rendition of judgment. Where the record does not disclose any reason why a motion for new trial was not filed within the statutory time it will be presumed there was no good reason, and, the filing thereafter not being authorized by statute, the motion cannot be considered. (*White v. Springfield etc. Ins. Co.*, 352.)
51. SAME—BILL OF EXCEPTIONS—TIME FOR FILING—ORDER PERMITTING FILING NUNC PRO TUNC—TRIAL—DENIAL OF MOTION FOR NEW TRIAL—CONCLUSION OF—REV. STATS. ARIZ. 1887, PAR. 828, CITED.—The motion for new trial having been denied, and that being taken as the time of the conclusion of the trial, where the record fails to show that the bill of exceptions was presented to the court within the ten days thereafter as required by statute, *supra*, the entry of a *nunc pro tunc* order permitting the filing as within the statutory time, in absence of good cause shown, was unauthorized and will not be recognized by this court as making it a part of the record nor as saving the motion for new trial incorporated therein. (*White v. Springfield etc. Ins. Co.*, 352.)
52. APPEAL AND ERROR—RECORD—ASSIGNMENTS OF ERROR—FAILURE TO FILE—REV. STATS. ARIZ. 1887, PAR. 940, CONSTRUED AND HELD MANDATORY.—Paragraph 940, *supra*, providing that the appellant shall file with the clerk of the court below an assignment of errors before he takes the transcript of the record from the clerk's office, is mandatory. An assignment of errors not so filed will not be considered as in the record. (*United States v. Tidball*, 384.)

APPEAL AND ERROR (Continued).

53. **APPEAL AND ERROR—RECORD—BILL OF EXCEPTIONS—REVIEW OF EVIDENCE—INSTRUCTIONS.**—Where the bill of exceptions and the transcript show that the evidence is not all preserved in the record this court cannot pass upon questions of admissibility of evidence or errors in instructions. All the evidence must be before the court. (*Territory v. Clanton*, 1.)
54. **SAME—ABSTRACT OF EVIDENCE.**—An abstract of all the evidence signed by the trial judge properly presents the evidence on appeal. (*Territory v. Clanton*, 1.)
55. **APPEAL AND ERROR—RECORD—GRAND JURY.**—The objection, raised for the first time on appeal, that the indictment was found by a grand jury of less than the statutory number of jurors, cannot be considered, as the statute limits the record, so far as the jury is concerned, to challenges to the panel or to individual grand jurors. (*Territory v. Kirby*, 288.)
56. **APPEAL AND ERROR—RECORD—RULINGS ON EVIDENCE—STATEMENT OF FACTS.**—This court will not review rulings upon introduction of evidence where the statement of facts is not presented to the trial judge for allowance within the time prescribed for bills of exceptions. (*Marks v. Newmark*, 224.)
57. **SAME—SAME—SAME—BILL OF EXCEPTIONS—NECESSITY FOR.**—Nor can it consider error alleged in the exclusion of evidence where there is no bill of exceptions preserved to the ruling complained of. (*Marks v. Newmark*, 224.)
58. **SAME—ASSIGNMENTS OF ERROR—MUST BE SPECIFIC.**—An assignment that "the court erred in giving judgment for the plaintiff instead of defendants," is too general for consideration on appeal. Error must be pointed out specifically. (*Marks v. Newmark*, 224.)
59. **SAME—SAME—ERROR IN OVERRULING MOTION FOR NEW TRIAL—REFERENCE TO MOTION INSUFFICIENT.**—An assignment of error that "the court erred in not granting defendants a new trial on grounds set forth in their motion for the same" is not sufficient, inasmuch as an inspection of the motion shows that, in addition to errors elsewhere assigned, it alleges the court erred "because the judgment is contrary to the law and against the weight of the evidence." It is not stated wherein the judgment is contrary to law. (*Marks v. Newmark*, 224.)
60. **SAME—SAME—REVIEW—EXTENT OF.**—Under this specification the court may only examine the record to find whether the judgment follows the pleadings. (*Marks v. Newmark*, 224.)
61. **SAME—REVIEW—JUDGMENT WILL NOT BE DISTURBED WHERE THERE IS EVIDENCE TO SUPPORT IT.**—It is for the trial court to determine the weight of the evidence. Its findings are not erroneous where there is evidence to support them. (*Marks v. Newmark*, 224.)

## APPEAL AND ERROR (Continued).

62. **APPEAL AND ERROR—REVIEW—CONFLICTING EVIDENCE.**—Where there is a substantial conflict in the evidence this court will not disregard the conclusion of the trial court. (*Brash v. White*, 212.)
63. **APPEAL AND ERROR—REVIEW—FAILURE TO SAVE OBJECTION BELOW—WAIVED.**—Where appellee entered no default upon appellant's failure to answer his counterclaim below, and permitted evidence thereon to be admitted without objection, appellee may assign error as to matters arising upon such counterclaim as it is too late on appeal to obtain an advantage which might have been taken at the trial had the default been properly entered. (*Slaughter v. Marlow*, 429.)
64. **APPEAL AND ERROR—STATEMENT OF FACTS—MUST BE SIGNED BY TRIAL JUDGE.**—A statement of facts not having been approved or signed by the trial judge cannot be considered by this court. (*Tietjen v. Snead*, 195.)
65. **SAME—MOTION FOR NEW TRIAL—RULING—MUST BE EMBODIED IN BILL OF EXCEPTIONS—OTHERWISE ERROR GROUND FOR NEW TRIAL WAIVED—REV. STATS. ARIZ. 1887, PAR. 842, CITED—PUTNAM V. PUTNAM ET AL., ANTE, P. 182, 24 PAC. 320, CITED.**—The motion for new trial and the ruling thereon not having been embodied in a bill of exceptions, as required by section 842, *supra*, we cannot consider any error on the ruling on the motion. Nor can we consider any error that might have been urged as ground for a new trial below, unless it had been so urged. *Putnam v. Putnam*, *supra*, cited. (*Tietjen v. Snead*, 195.)
66. **SAME—BILL OF EXCEPTIONS—ERROR MUST AFFIRMATIVELY APPEAR—PRESUMPTION THAT RULING IS CORRECT.**—An exception to a ruling of the trial court in excluding evidence is not properly stated where it is not shown that the witnesses were competent, nor that any competent questions were propounded, nor that the answer thereto, if allowed, would have been favorable to the appellant. The exclusion may have been proper, or the party complaining may not have been injured, and until the contrary is shown the presumption is in favor of the correctness of the ruling. (*Tietjen v. Snead*, 195.)
67. **SAME—BILL OF EXCEPTIONS—MUST SHOW IT WAS SUBMITTED TO OPPOSITE PARTY—REV. STATS. ARIZ. 1887, PAR. 829, CITED.**—The bill of exceptions must show that it has been submitted to the opposite party before it was signed and filed, as required by section 829, *supra*. (*Tietjen v. Snead*, 195.)
68. **SAME—BURDEN OF ESTABLISHING—PRESUMPTIONS IN FAVOR OF JUDGMENT.**—The burden of establishing error is upon the appellant, and every presumption must be indulged by this court in favor of the judgment of the lower court. (*Tietjen v. Snead*, 195.)
69. **APPEAL AND ERROR—STATEMENT OF FACTS—TIME FOR FILING—REV. STATS. ARIZ. 1887, PAR. 843, 845, CITED.**—Where it appears that

**APPEAL AND ERROR (Continued).**

the statement of facts is filed after the term, and there is no order entered of record extending the time for filing, it will be stricken out on motion. (*Lemon & McCabe v. Ward*, 219.)

70. **SAME—RECORD—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL—ASSIGNMENT OF ERROR—PUTNAM V. PUTNAM**, ANTE, P. 182, 24 PAC. 323, CITED AND APPROVED.—Where it does not appear that a motion for a new trial was made part of the record by bill of exceptions and the order of the trial court in overruling the motion for a new trial is not assigned as error this court cannot consider any error which would have been good cause for a new trial. (*Lemon & McCabe v. Ward*, 219.)
71. **APPEAL AND ERROR—UNCONTRADICTED EVIDENCE—VERDICT.**—Plaintiff, defendant's agent, was suddenly injured and incapacitated for work for several weeks, during which time the office was in charge of other employees of defendant, who failed to check up or count the plaintiff's cash for two or three weeks after the injury. They then claimed plaintiff \$800 short, which plaintiff paid; but upon recovery he examined the books and asserted that he had paid out money to the company and for the company for which they should reimburse him. He testified that on the day of his injury there was \$2,300 in the safe. It is admitted that if this were so he was not short, and that the amount recovered is due him. There being no evidence to dispute his statement, the verdict of the jury based thereon should not be disturbed on appeal. (*Martin v. Wells, Fargo & Co.*, 57.)
72. **APPEAL AND ERROR—WHAT APPEALABLE—FINAL JUDGMENTS—ORDER DISSOLVING TEMPORARY INJUNCTION—HISTORY CO. VS. DOUGHERTY**, POST, P. 387, 29 PAC. 649, CITED AND APPROVED.—This court has jurisdiction on appeals from final judgments, citing *History Co. v. Dougherty*, *supra*. This court has no jurisdiction of an appeal from an order dissolving a temporary injunction; it not being a final judgment. (*Bogan v. Pignataro*, 383.)

See Criminal Law, 1, 10; Jury, 1; Jury Trial, 2; Venue, 1.

**ASSESSMENT.**

How made. See Statutory Construction, 5; Taxation, 2.

1. **ASSIGNMENTS—RECORDING—ABSENCE OF STATUTE—NOT CONSTRUCTIVE NOTICE.**—Where there is no law providing for the recording of assignments of judgments in the county recorder's office such record does not give constructive notice. (*Martin v. Wells, Fargo & Co.*, 355.)
2. **SAME—NOTICE—BURDEN OF PROOF.**—The burden of proof is on the assignee to show that the judgment debtor had notice of the assignment before his set-off was obtained. In absence of proof that

**ASSESSMENT (Continued).**

the debtor had notice of the assignment prior thereto the right of set-off still exists. (*Martin v. Wells, Fargo & Co.*, 355.)

See Set-off, 2.

**ASSIGNMENT FOR BENEFIT OF CREDITORS.**

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS—CREDITORS—LIEN—ASSIGNOR'S INTEREST TERMINATED—NECESSARY PARTIES—CREDITOR'S BILL.**—By virtue of an assignment every *bona fide* creditor of the assignor has, in equity, a *quasi* lien upon the estate assigned, *pro rata* of his debt, as was collectible under the terms of the assignment. The assignment being general for the benefit of creditors, the assignors being insolvent, ceased by virtue of the assignment to have any further interest in the estate assigned, for by its terms, if there was any estate remaining, after paying the individual debts of the assignors, it was to be applied to liquidating the partnership debts of the firm of H. & Co. Therefore H. and T., assignors, were not necessary parties. (*Stiles v. Samamego*, 48.)

**ASSIGNMENT OF ERROR.**

Failure to file, effect. See Appeal and Error, 28, 35, 52.

Must be specific. See Appeal and Error, 58.

See Appeal and Error, 2-3, 5, 46, 59-60.

**BANKS AND BANKING.**

1. **BANKS AND BANKING—CASHIERS—REPRESENTATIONS BY—WHEN BINDING UPON BANK—DEFENSE.**—In the absence of affirmation of existing facts a promise made by the cashier of a bank to parties about to become sureties, that their contract of suretyship would not be enforced against them, is a mere matter of form, and will not bind the bank. If the affirmations were relied upon the plea should be in fraud. (*Albuquerque Nat. Bank v. Stewart*, 293.)
2. **BANKS AND BANKING—CHECKS—REFUSAL TO PAY—NO LIABILITY TO HOLDER.**—A bank is not liable to the holder of a check drawn by a general depositor for its refusal to pay the check, though it has sufficient funds of the drawer to pay the amount called for. (*Satterwhite v. Melczer*, 162.)

**BILL OF EXCEPTIONS.**

Must contain all evidence for court to pass upon errors in admission and exclusion of evidence and instructions. See Appeal and Error, 53.

Must show it was submitted to opposite party. See Appeal and Error, 67.

Necessity for. See Appeal and Error, 57.

Purpose of. See Appeal and Error, 39.

Time for filing. See Appeal and Error, 51.

When unnecessary. See Appeal and Error, 37.

See Appeal and Error, 8-10, 12, 23, 25, 31, 66, 70.

**BILL OF PARTICULARS.**

Objections to must be made in trial court and must be specific.  
(*Miller v. Green*, 205.)

See Appeal and Error, 17.

**BOARD OF SUPERVISORS.**

1. **BOARD OF SUPERVISORS' POWER TO BIND COUNTY FOR MILEAGE IN SERVING SUBPENA OUTSIDE OF THE TERRITORY**—REV. STATS. 1887, PAR. 579, CLAUSE 9, CITED.—Where it appears from the records of the proceedings of the board of supervisors that the sheriff shall be allowed mileage to subpoena witnesses without the territory in a specified case, such employment is sufficient to bind the county; the board having power, under statutes, *supra*, to employ means to secure the attendance of necessary witnesses who cannot be secured by the ordinary process of the court. (*Yavapai County v. O'Neill*, 363.)

See Counties, 3; Evidence, 5; Statutory Construction, 3.

**BOND.**

Form might be disregarded, but it must comply substantially with requirements of statute to give appellate court jurisdiction.  
(*Johnston v. Letson*, 344.) See Appeal and Error, 14.

Injunction bond does not include counsel fees. See Injunctions, 1.  
Must be filed at proper time. See Appeal and Error, 48.

Of officers; when new one must be given. See Appeal and Error, 6.  
Proper one is prerequisite to appellate jurisdiction. (*Railly v. Crowley*, 286.) See Appeal and Error, 13-14.

**CASHIERS.** See Banks and Banking, 1.

**CHAIRMAN OF BOARD OF SUPERVISORS.**

Power to bind county. See Counties, 3.

**CHALLENGES.** See Jury, 1.

**CHECKS.**

Refusal to pay; no liability to holder on part of bank. See Banks and Banking, 2.

**CITIZENSHIP.**

Presumption of residence. See Mines and Mining, 1.

**CIVIL SUITS.** See Actions, 1.

**CLAIM OR COLOR.**

"Claim or color" means color of title. See Public Lands, 1.



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CLERK OF COURT.

Fees of. See Officers, 2.

COLLATERAL ATTACK. See Corporations, 4; Judgments, 2, 4;  
Public Lands, 7.

## COLOR.

Defined. See Public Lands, 1.

## CONCLUSIONS OF LAW.

Must not be pleaded. See Fraud, 4.

CONSTITUTIONAL LAW. See Irrigation, 4; Statutes, 1-3.

## CONSTRUCTION.

An answer containing elements of contract and fraud averments essential to the plea of fraud will be construed upon the theory of contract. See Pleading, 3.

See Statutes, 1-2.

## CONTEMPT.

1. CONTEMPT—REVIEW—HABEAS CORPUS.—This court will not grant a writ of *habeas corpus* where a party has been committed for a contempt by a court having jurisdiction of the person and the subject-matter. (Ex Parte Brown, 411.)

CONTINUANCE. See Criminal Law, 1; Trial, 1.

## CONTRACTS.

1. CONTRACTS—DUTY TO READ—SIGNATURE BINDING IN ABSENCE OF FRAUD.—A person of ordinary intelligence is bound to know the contents and nature of an instrument he signs, unless imposed upon by some fraudulent device in the securing of his signature. (History Co. v. Dougherty, 387.)

See Appeal and Error, 7; Counties, 3; Irrigation, 1; Principal and Agent, 1; Sales.

## CORPORATIONS.

1. CORPORATIONS—CREDITOR'S BILL—STOCKHOLDERS—UNPAID SUBSCRIPTIONS—PLEADINGS.—A complaint which alleges the recovery of certain judgments against a corporation while the subscriptions of H. and T. were vital and unpaid, and that execution thereon against its property had been returned *nulla bona*, states a sufficient cause of action in that connection to reveal the liability of H. and T. and hence the assignee of their estates. (Stiles v. Samaniego, 48.)
2. CORPORATIONS—FOREIGN—POWERS—PRESUMPTION.—In absence of proof to the contrary, it will be presumed that a foreign corpora-

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CORPORATIONS (Continued).

- tion has the same powers to sue and be sued, to appear and defend when sued, or suffer default and judgment thereby, as a domestic private corporation. (Keyser v. Shute, 336.)
3. SAME—JUDGMENTS—POWER TO CONFESS—INCIDENT TO THE RIGHT TO SUE AND BE SUED.—A private corporation has the right to confess judgment. (Keyser v. Shute, 336.)
  4. SAME—INSOLVENT—PREFERENCES—CONFESSION OF JUDGMENT—WHO MAY COMPLAIN—VOIDABLE—COLLATERAL ATTACK.—Even though it be true that an insolvent corporation may not give a preference by confession of judgment or otherwise, only existing creditors can complain. Such preferential judgment is not void but voidable, and is not subject to collateral attack. (Keyser v. Shute, 336.)

## COSTS.

1. COSTS—ACTIONS AT LAW—LOSING PARTIES PAY COSTS.—In actions at law it is a general rule that losing parties are to pay the costs. (United States v. One Hundred and Fifty Cattle, 134.)  
See Customs, 1.

## COUNTIES.

1. COUNTIES—CLAIM FOR MONEY AGAINST—NECESSITY FOR PRESENTATION OF CLAIM TO BOARD OF SUPERVISORS—REV. STATS. ARIZ. 1887, PARS. 384, 407, 552, CITED AND CONSTRUED AND REMEDY PROVIDED HELD EXCLUSIVE.—Presentation of a claim against a county to the board of supervisors for its action is a condition precedent to the maintenance by the claimant of an action thereon, and the remedy prescribed by statutes, *supra*, for the establishment and enforcement of claims for money against the county is exclusive. (Yavapai Co. v. O'Neill, 363.)
2. SAME—SAME—CLAIMS ALLOWED IN PART—CLAIMANT MUST ACCEPT AS FULL SETTLEMENT OR WHOLLY REJECT—REV. STATS. ARIZ. 1887, PARS. 414 AND 383, CITED.—Paragraph 414, *supra*, requires the claimant, if he be dissatisfied with the allowance by the board to either forego the part rejected or submit his claim as a whole to the courts. An agreement between the board of supervisors and the claimant, providing that the acceptance by the claimant of a warrant for a part of his claim shall not operate to affect the claimant's right to proceed by suit to establish his whole claim, is void. (Yavapai Co. v. O'Neill, 363.)
3. COUNTIES—CONTRACTS—CHAIRMAN OF BOARD OF SUPERVISORS—DISTRICT ATTORNEY—POWER TO BIND COUNTY.—Whether the board of supervisors could make a valid agreement to pay compensation for arrest made outside the territory is not determined. The chairman of the board, by virtue of his office, cannot bind the county, nor can the district attorney. (Yavapai Co. v. O'Neill, 363.)

**COURTS.**

1. **COURTS—REGULARITY OF PROCEEDINGS—PRESUMPTIONS—WANT OF RECORD—SPECIAL TERM—CONVENING ORDER.**—While what is recited in the record of a court of general jurisdiction as having been done is presumed to be done, this presumption will not put into the record what is not there. The record of a special term must show that it met according to law and upon due notice. (*Territory v. Delinquent Tax List*, 69.)
2. **COURTS—SPECIAL TERMS—RECORD.**—The record must affirmatively show the authority by which a special term is held. (*Territory v. Delinquent Tax List*, 69.)
3. **COURTS—SUPREME COURT—NO POWER TO MAKE RULES—PRACTICE IN TO BE DETERMINED BY JUDICIAL CONSTRUCTION.**—The legislature has conferred no power upon this court to make rules of practice. These must be supplied by judicial construction. (*Putnam v. Putnam*, 182.)
4. **COURTS—UNITED STATES SUPREME COURT—DECISIONS BINDING ON TERRITORIAL COURTS—CONSTRUCTION OF LOCAL STATUTES.**—The territorial courts are completely subordinate to the United States Supreme Court. It is the court of final resort, and its decisions are binding and conclusive upon this court in the construction of our local statutes as well as in other cases. (*Greer v. Richards*, 227.)

See *Officers*, 2.

**CREDITORS.**

Lien of upon estate assigned. See *Assignment for Benefit of Creditors*, 1.

**CREDITOR'S BILL.**

To enforce unpaid stock subscriptions maintainable against assignee of subscribers. (*Stiles v. Samaniego*, 48.)

**CRIMINAL LAW.**

1. **CRIMINAL LAW — CONTINUANCES — AFFIDAVITS — UNCERTAINTY — GRANTING DISCRETIONARY—APPEAL AND ERROR—REVIEWED ONLY WHEN REFUSAL UNJUST.**—When affidavits for continuance fail to state that the party expects to procure the testimony of the witnesses at any time, with such uncertainty, a criminal case ought not to be continued. A continuance in a criminal action rests in the sound discretion of the court and will not be reversed except in cases manifestly arbitrary and unjust. (*Territory v. Dooley*, 60.)
2. **CRIMINAL LAW—EVIDENCE.**—Evidence to show that between March 12 and April 15, 1889, the defendant Meyer, agent of Wells, Fargo & Co., disposed of certain of its money orders for his personal benefit was admissible as tending to connect defendant with any

**CRIMINAL LAW (Continued).**

shortage in the office after April 15th, although it was admitted that the money-order business had been correctly reported up to said date, for the reason that these reports were not sent in when due, but were retained by defendant for days after they should have been forwarded. (Territory v. Meyer, 199.)

3. **SAME—SAME—ADMISSION—STATEMENTS MADE BY AUTHORITY OF ACCUSED.**—Where it is the duty of a clerk to make out statements of the business of the office, under defendant's instructions, and such statements so made are placed upon defendant's desk, where he is frequently, and called to his attention, the evidence is sufficient to show that defendant has knowledge of their contents, and they are properly admitted as admissions by defendant as to their contents. (Territory v. Meyer, 199.)
4. **SAME—INSTRUCTIONS TO JURY—PROOF OF EMBEZZLEMENT OF MONEY ORDERS SUFFICIENT UNDER INDICTMENT FOR EMBEZZLING MONEY.**—Defendant used money orders, for his own benefit, in form and purporting on their face to be receipts for money by defendant, as agent of the company, to be repaid to the holders by the company. In legal effect such use amounted to a payment to him of the money they called for, and he is estopped from denying its receipt. An instruction, upon a trial for embezzlement of money, that if the jury should believe from the evidence that the defendant used certain orders in the payment of his debts, and that he did not actually receive the money for them, he could not be convicted for the embezzlement of the orders, is properly refused. (Territory v. Meyer, 199.)
5. **SAME—SAME—AGENT ENTITLED TO COMMISSION NOT PART OWNER.**—An instruction asked by defendant, that if defendant was agent of the company and entitled to a commission on the net proceeds he would be a part owner therein and could not be guilty of embezzlement should he convert the whole thereof to his own use, is properly refused. (Territory v. Meyer, 199.)
6. **SAME—REV. STATS. ARIZ. 1887, SEC. 788, OF PENAL CODE, CITED AND CONSTRUED—ELEMENTS OF CRIME—AGENT ENTITLED TO COMMISSION—TRUSTEE AS TO REMAINDER.**—To sustain a conviction under the statute, these facts must be shown: (1) The trust relation; (2) the possession or control of the property by virtue of the trust; and (3) the fraudulent appropriation of the property not in the due and lawful execution of the trust. If an agent authorized to carry on a business for his principal receives a commission upon the proceeds of the business he is still a trustee for the use of his principal as to the remainder, and has in his possession property by virtue of his trust. (Territory v. Meyer, 199.)
7. **CRIMINAL LAW—EVIDENCE—PREVIOUS CONVERSATION BETWEEN PROSECUTING WITNESS AND DEFENDANT.**—A defendant will not be

## CRIMINAL LAW (Continued).

- permitted to testify as to a conversation between the prosecuting witness and himself three hours before the alleged assault. (Territory v. Dooley, 60.)
8. **SAME—JURY—IMPEACHING VERDICT.**—A jury cannot impeach their own verdict by a showing that in their deliberations they arrived at their verdict by some of them being persuaded that the punishment would be light. (Territory v. Dooley, 60.)
  9. **SAME—SAME—CUSTODY—SWORN OFFICER.**—There is no provision of the criminal statutes requiring an officer in charge of the jury to be sworn. (Territory v. Dooley, 60.)
  10. **SAME—APPEAL AND ERROR—INSTRUCTIONS TO JURY—FAILURE TO INSTRUCT JURY—REQUEST MUST BE MADE OR ERROR WAIVED.**—Where the court did not charge the jury that they could render a verdict for an assault with a deadly weapon, or any less offense, the defendant, not having asked for such instruction, cannot take advantage on appeal of the failure so to instruct, though a refusal on request would have been error. (Territory v. Dooley, 60.)
  11. **CRIMINAL LAW—MORAL CERTAINTY—REASONABLE DOUBT.**—Proof to a moral certainty is not required in a criminal case. All reasonable doubt of defendant's guilt must be removed—no more. (Territory v. Clanton, 1.)
  12. **SAME — WITNESS — VERACITY — CHARACTER—EVIDENCE—GENERAL REPUTATION—PROCEDURE REGULATED BY STATUTE IN FORCE AT TIME.**—Confining proof of character of a witness to his general reputation in the neighborhood where he resided, for truth and veracity, is the common-law rule adopted by the new statute, and the course of procedure in criminal and civil trials is governed by the law in force at the time. (Territory v. Clanton, 1.)
  13. **CRIMINAL LAW—PROVINCE OF JURY—JUDGES OF FACTS.**—It is the exclusive province of the jury, aided by the court only as to questions of law, to say what fact or facts have been proven or not. (Territory v. Kay, 92.)
  14. **SAME—INSTRUCTIONS—ASSUMPTION OF MATERIAL FACTS AS PROVEN.**—Assumption of material facts as proven in an instruction is error. (Territory v. Kay, 92.)
  15. **SAME—SAME—DEGREE OF PROOF—REASONABLE DOUBT.**—An instruction in a murder case to "weigh the testimony of all the witnesses in the case, and from that examination of all the testimony, and all that has been given in the case, and render such a verdict as you believe is fair, just, and right," is error, though a proper instruction as to the degree of proof required as that which satisfies beyond a reasonable doubt was given in another part of the charge. (Territory v. Kay, 92.)

**CUSTOMS.**

1. **CUSTOMS—SEIZURE OF GOODS—PROCEEDINGS AT LAW—WHEN CLAIMANT LIABLE FOR COSTS**—18 U. S. STATS. AT LARGE, 188, 189, SEC. 16 CITED.—In cases of seizure of goods for violation of the customs laws, the proceeding is at common law. Only in cases of a payment or forfeiture is the claimant or property seized liable for cost of same. (United States v. One Hundred and Fifty Cattle, 134.)

**DAMAGES.**

1. **DAMAGES—MEASURE OF—ACTUAL COMPENSATION FOR LOSS.**—In actions for breach of contract the circumstances of each case must determine what measure of damages should apply, having in view always the giving of actual compensation for actual loss. (Slaughter v. Marlow, 429.)
2. **DAMAGES—NEGLIGENCE—DEFENSE—WANT OF INTEREST IN PROPERTY—EVIDENCE.**—In an action for damages for the negligent destruction of a house by fire, where the defense is that the plaintiff has no title to the property, evidence that plaintiff had built the house upon land belonging to a third party, without any agreement or authority so to do, is proper as tending to show that plaintiff had no property interest in the house for which he could recover. (Prescott etc. R. R. Co. v. Rees, 317.)

See Injunctions, 1; Irrigation, 2, 5; Sales, 1-2.

**DEBT.**

Promissory note held by non-resident taxable only at place of residence of the owner, which is the situs of the note for purposes of taxation. See Taxation, 3.

**DEFENSE.**

Homestead exemption. See Mortgages, 3.

See Ejectment, 1; Irrigation, 5; Pleading, 1, 2, 4.

**DEGREE OF PROOF.** See Criminal Law, 15.

**DILIGENCE.** See New Trial, 1.

**DELINQUENT TAXES.**

Collection proceeding in rem. See Taxation, 4-5.

**DISTRICT ATTORNEY.**

Power to bind county. See Counties, 3.

**EJECTMENT.**

1. **EJECTMENT—DEFENSE—ESTOPPEL IN PAIS.**—Kales, mortgagee of Bryan, was, upon Bryan's death, appointed administrator of his estate at the widow's suggestion. To enforce his mortgage debt K.

**EJECTMENT (Continued).**

brought suit against himself as administrator and the property was sold for its market value to him under the order of sale. The widow and plaintiff, her grantee, had full knowledge of the suit to foreclose and sale but failed to redeem. Kales assigned the certificate to Pinney, who with his grantees were in possession for more than three years prior to the commencement of the action, paying taxes and making valuable improvements, with the knowledge and acquiescence of the widow and plaintiff. Though the decree under which the sale was made may have been a nullity, likewise the sale, the plaintiff and the widow, knowing that the claim of the defendants to the property rested upon that sale, by remaining silent and permitting the expenditures by defendants, are now estopped to assert title. (*Bryan v. Pinney*, 412.)

2. **SAME—MORTGAGES—INVALID FORECLOSURE—ASSIGNEE OF CERTIFICATE OF SALE SUBROGATED TO RIGHTS OF MORTGAGEE—MORTGAGEE IN POSSESSION.**—The mortgagee, under an attempted foreclosure, purchased the property at the sale for the amount of the debt, and assigned the certificate, for value, to defendants, who thereby if the sale under foreclosure was invalid became the assignees of the mortgage debt. The defendants entered peaceably into possession, with plaintiff's knowledge, and made improvements. The possession being lawful, defendants are mortgagees in possession after condition broken, and should be protected therein. (*Bryan v. Pinney*, 412.)
4. **EJECTMENT—RIGHT OF POSSESSION BASIS—MORTGAGES—MORTGAGEE IN POSSESSION—PURCHASERS UNDER INVALID JUDGMENT—PAYMENT OF DEBT CONDITION OF RECOVERY.**—The action of ejectment is based on the right of possession. When it appears that plaintiff's testator mortgaged the premises to one Kales, who in his individual capacity sued himself as administrator of the mortgagor and bought the land under order of sale made under the decree of the court therein, the grantees of Kales, being in possession will be subrogated to Kales' rights under the mortgage and be held mortgagees in possession, and entitled to remain in possession till the debt and requirements of equity are fully met. (*Bryan v. Brasius*, 433.)
3. **EJECTMENT—MORTGAGEE IN POSSESSION—PAYMENT OF DEBT CONDITION OF RECOVERY.**—Facts held to exist which constitute defendant a mortgagee in possession and that, so long as the mortgage debt remained unpaid, he could not be dispossessed. (*Bryan v. Kales*, 423.)
5. **SAME—MORTGAGOR AGAINST MORTGAGEES IN POSSESSION—LIMITATION OF ACTIONS—BAR DOES NOT AFFECT PAYMENT OF DEBT AS CONDITION OF RECOVERY.**—In an action of ejectment against mortgagees in possession the plea that the debt secured by the mortgage is barred by the statute of limitations will not avoid the necessity of paying

**EJECTMENT (Continued).**

the debt as a condition to the recovery of possession. (*Bryan v. Brasius*, 433.)

See Public Lands, 7.

**ELECTION.** See Pleading, 1; Sales, 2.

**EMBEZZLEMENT.**

Proof of embezzlement of money order sufficient under indictment for embezzling money. (*Territory v. Meyer*, 199.)

See Criminal Law, 4.

**EMINENT DOMAIN.**

1. **EMINENT DOMAIN—POWER OF TERRITORY TO PROVIDE FOR EXERCISE OF**—REV. STATS. ARIZ. 1887, TITLE 22, "EMINENT DOMAIN," CITED—WITHIN LEGISLATIVE POWERS DELEGATED BY REV. STATS. U. S., 1878, SEC. 1851—IDEM, ORGANIC LAW OF ARIZONA, REV. STATS. ARIZ. 1901, PAR. 15, CITED.—Congress, having power to pass an act providing for the exercise of the power of eminent domain in the territory, has delegated this power, by section 1851, *supra*, to the territorial legislature. (*Oury v. Goodwin*, 255.)
2. **SAME—PUBLIC USE—HOW DETERMINED.**—There is no definition of a public use yet formulated to which one can go as a certain criterion. To know what is a public use which authorizes the power of eminent domain recourse must be had to cases rather than to definitions. (*Oury v. Goodwin*, 255.)
3. **SAME—SAME—USES APPARENTLY PRIVATE—GENERAL WELFARE—PUBLIC POLICY.**—In many instances where various states have clothed private corporations and individuals with the power of eminent domain there is no participation by the general public, and the public use consists in the purely incidental benefits. Peculiar conditions, and the great benefit that would result to the general public seemed to justify a public policy authorizing the taking of private property to promote the general welfare. (*Oury v. Goodwin*, 255.)
4. **SAME—PRIVATE OWNERSHIP MUST YIELD TO PUBLIC NECESSITY—"PUBLIC NECESSITY" DEFINED.**—All condemnation acts are predicated on the proposition that private ownership must yield to public necessity. "Public necessity" often means public convenience and advantage. (*Oury v. Goodwin*, 255.)
5. **SAME—GENERAL LAWS—TO DEVELOP RESOURCES.**—A territory may legislate by laws general in their operation, exercising the power of eminent domain, that its advantages and resources may receive the fullest development for the general welfare. (*Oury v. Goodwin*, 255.)

See Irrigation, 4; Statutes, 1.



**EQUALIZATION.** See Statutory Construction, 3.

**EQUITY.**

1. **EQUITY—LACHES—ACTION TO SET ASIDE JUDGMENT OF FORECLOSURE.**—Where plaintiff's grantor stood by and saw property sold under foreclosure, failed to redeem, brought no action to set aside the judgment of foreclosure, for nearly four years saw the property enhance greatly in value, saw it sold time and time again, then sells it to the plaintiff, who asks that the judgment be annulled and the subsequent transfers canceled, equity will refuse relief, the parties having slept too long on their rights. (*Bryan v. Pinney*, 27.)

**EQUITY AND LAW.**

Distinction between "law" and "equity" preserved in action to quiet title. See Action to Quiet Title, 1.

No distinction between. See Actions, 1.

**ERRORS.**

Assumption of material facts as proven in an instruction is error. See Criminal Law, 14.

Burden of establishing on appellant. See Appeal and Error, 68; Jury Trial, 2.

How made part of record. See Appeal and Error, 42.

Must affirmatively appear. See Appeal and Error, 66; Jury Trial, 2.

**ESTOPPEL.**

Purchase of outstanding title does not admit title in grantor of purchaser. See Title, 1.

In pais—defense in action of ejectment. See Ejectment, 1.

Estoppel of record—judgment cannot be without there are adverse parties. See Judgments, 6.

**EVIDENCE.**

1. **EVIDENCE—CONTENTS OF TELEGRAM—PAROL EVIDENCE—FOUNDATION—COMMUNICATIONS BETWEEN PLAINTIFF AND THIRD PARTIES.**—In an action by a sheriff against a county for fees a witness was permitted to testify to the contents of certain telegrams. This was erroneous, as the proper foundation was not laid for the admission of parol evidence of their contents, and because communications between a sheriff and a third person are incompetent to establish an agreement between the sheriff and board of supervisors relative to the subject-matter of such communications. (*Yavapai Co. v. O'Neill*, 363.)
2. **EVIDENCE—MATERIALITY—PRESUMPTION.**—Objection to a question put to a witness as to whether he did not consider the security for the individual note ample at the time the loan was made properly sustained, as it is to be presumed he did from the fact of the loan being made, and it is not to be considered as tending to show

**EVIDENCE (Continued).**

that the firm note was or was not given as additional security at a time months later. (Lewis v. Hayden, 277.)

3. **SAME—SAME—CONTRADICTION FACT ADMITTED.**—Evidence that Webster, the partner making the individual note, was indebted to the firm at the time the note was made, unless the holder knew he was so indebted, would not be material further than as indicating whether the loan was made for his own benefit or for that of the firm, but as it was conceded it was used for the firm it was properly excluded. (Lewis v. Hayden, 277.)
4. **SAME—EXPERT TESTIMONY—FAILURE TO QUALIFY—HARMLESS ERROR.**—Where one of the members of the firm had testified that certain words had been substituted for others originally upon the note, it was not error for the court to refuse to permit him to testify that the erasures had been made with a chemical, he having not qualified as an expert and the firm having had the benefit of his positive testimony as to the change. (Lewis v. Hayden, 277.)
5. **EVIDENCE—MINUTES OF BOARD OF SUPERVISORS BEST EVIDENCE—PRESUMPTIONS—PAROL EVIDENCE NOT ADMISSIBLE—REV. STATS. ARIZ. 1887, PARS. 394, 395, CITED.**—Statutes, *supra*, require that the clerk of the board of supervisors shall record all proceedings of the board, and that the board must cause such a record to be kept. It will be presumed that the board and its clerk have done their duty and, if the board made an order, that there is a record of it. Such record is the best and only evidence of such order. In the absence of a showing that there is no record of the action of the board, parol evidence is not competent to prove the action of the board. (Yavapai Co. v. O'Neill, 363.)
6. **EVIDENCE—RELEVANCY.**—In an action upon a written contract, ordering thirty-nine books, evidence that at the time of the order the agent was only soliciting subscriptions for the entire thirty-nine volumes was irrelevant. (History Co. v. Dougherty, 387.)
7. **EVIDENCE—RELEVANCY—ADMISSION AS TO PREVIOUS ARREST FOR OTHER CRIME.**—Evidence of the admission of the defendant that he was arrested for robbing the government, and that it cost him a good deal of money to get out of it held irrelevant where it had no connection with the crime charged and reversible error as tending to prejudice the jury. (Territory v. Youree, 346.)

See Appeal and Error, 3, 15-16, 18-20, 22-24, 32-33, 54, 62, 71; Criminal Law, 2-3, 7, 12; Damages, 2; Larceny, 1; Lease, 1; Mines and Mining, 2-3; Mortgages, 2; New Trial, 1; Pleading, 6; Public Lands, 2; Rape, 1; Sales, 2; Statutory Construction, 5.

**EXCEPTIONS.**

How brought into record. See Appeal and Error, 37.

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EXCLUSION OF EVIDENCE.

Assignment of error based upon must be saved by motion for new trial. (Albuquerque Nat. Bank v. Stewart, 293.) See Appeal and Error, 3.

## EXECUTIONS.

1. EXECUTIONS—TO WHOM DIRECTED—LAWS 1889, SEC. 2, P. 37, CONSTRUED—REV. STATS. ARIZ. 1887, PAR. 1895, REPEALED—REV. STATS. ARIZ. 1887, PAR. 512, CITED.—Statute, *supra*, provides that an execution must be directed to the sheriff of the county where it is served, and repeals the provision of the Revised Statutes of Arizona of 1887, *supra*, which permitted its direction to constables. The "other officer" referred to in the act of 1889 refers to the provision of paragraph 512 of the Revised Statutes of Arizona of 1887, which designates other officers who shall perform his duties in case of his disqualification. (Satterwhite v. Melczer, 162.)
2. SAME—LEVY—UPON MONEY—ACTS 1889, P. 39, SEC. 9, CLAUSE 2, CITED.—Under statute, *supra*, to make a valid levy upon money the officer must reduce it to possession. (Satterwhite v. Melczer, 162.)
3. SAME—SAME—RETURN—BINDING UPON JUDGMENT CREDITOR.—Where an officer has made return of an execution stating that he has levied upon money in the hands of a bank belonging to the judgment debtor, Wise, the fact that such bank was a simple debtor to Wise and that he had no specific money in its hands as bailee cannot change the effect of the levy from one upon money to one upon a debt. (Satterwhite v. Melczer, 162.)

## EXEMPTION.

Homestead; Defense. See Mortgages, 3.  
See Statutory Construction, 4.

## EXPERT.

Failure to qualify. See Evidence, 4.

## FALSE REPRESENTATIONS.

Must be concerning some fact. See Fraud, 3.  
When actionable. See Fraud, 3.

## FEES.

Counsel, not included in injunction bond under statute. See Injunctions, 1.  
See Officers, 2; Sheriffs, 1, 2, 3; Sheriff's Fees, 1.

## FINAL JUDGMENTS.

Order dissolving temporary injunction not a final judgment. Therefore not appealable. (Bogan v. Pignataro, 383.)  
See Appeal and Error, 72.

**FIXTURES.** See Real Property, 1.

**FORCIBLE ENTRY AND DETAINER.**

1. **FORCIBLE ENTRY AND DETAINER—STATUTORY REMEDY.**—The action of forcible entry and detainer does not exist independent of statute. (Bishop v. Perrin, 350.)
2. **SAME—ISSUE INVOLVED—JURISDICTION—SUMMARY REMEDY—REV. STATS. 1887, PAR. 2016, CITED.**—Statute, *supra*, provides that the only issue shall be the right of actual possession. The action may be tried by the probate judge or justice of the peace, and is summary in character. (Bishop v. Perrin, 350.)
3. **SAME—APPEALS—WHEN PERMITTED—REV. STATS. 1887, PAR. 2026, CITED AND CONSTRUED.**—Statute, *supra*, grants the right of appeal when the damages exceed one hundred dollars, but in no case from a judgment on the "right of actual possession." The general statute of appeals does not apply except where the appeal is specially allowed. (Bishop v. Perrin, 350.)

**FORECLOSURE.** See Judgments, 5; Mortgages, 3, 4, 5.

**FRAUD.**

1. **FRAUD—FALSE REPRESENTATIONS AS TO TITLE—PLEADING—FAILURE TO STATE CAUSE OF ACTION.**—Where it appears from the complaint that the fraud alleged to have been practiced upon the vendee related solely to the title of the property sold to him, and there is no allegation that the false representation made by the vendor was to any matter peculiarly within his knowledge, and that the vendee has been guilty of gross carelessness in failing to investigate the title and right of possession, and in failing to demand a warranty deed a demurrer to the complaint is properly sustained. (Bianconi v. Smith, 320.)
2. **SAME—REAL PROPERTY—SALES—FRAUDULENT REPRESENTATION—WHEN ACTIONABLE.**—A vendee may maintain an action for damages against his vendor, upon a sale of real property, upon the ground of false and fraudulent representations, when they relate to some matter collateral to the title and right of possession, or relate to some matter connected with the title peculiarly within the knowledge of the vendor, and not otherwise. (Bianconi v. Smith, 320.)
3. **FRAUD—REPRESENTATIONS AS TO EXISTING INTENT TO DO ACTS IN FUTURE.**—Fraud cannot be predicated upon a representation of an existing intent thereafter to do or not to do a particular thing. (History Co. v. Dougherty, 387.)
4. **SAME—PLEADING—CONCLUSIONS OF LAW.**—An answer to a complaint alleging a written contract for the purchase of certain books, setting up that the defendant made an oral agreement with plaintiff's

**FRAUD** (Continued).

agent, and that immediately thereupon, the agent fraudulently substituted a written memorandum expressing an entirely different contract, is subject to demurrer. The application of the epithet "fraudulent" to the transaction is not a sufficient allegation of fraud. Facts showing fraud must be alleged. (*History Co. v. Dougherty*, 387.)

See Pleading, 2.

**FUNDAMENTAL ERROR.** See Appeal and Error, 2, 8.

**GENERAL LAWS.** See Eminent Domain, 4.

**GOVERNOR.**

Cannot be mandamusd. See Mandamus, 1.

**GRAND JURY.** See Appeal and Error, 55.

**GRANT.**

Construction of. See Public Lands, 1.

**HABEAS CORPUS.** See Contempt, 1.

**HARMLESS ERROR.** See Appeal and Error, 19, 32; Evidence, 4; Jury, 1.

**HOLDER.**

Bona fide. See Negotiable Instruments, 1, 2.

**IDENTITY.**

Of persons cannot be presumed from identity of names. See Judgments, 2, 3, 5.

**IMPEACHMENT.**

Of witnesses. See Larceny, 1; Witnesses, 2.

**IMPROVEMENTS.**

Not exempt, although right of way belonging to railroad is. See Statutory Construction, 4.

**INDIANS.**

1. **INDIANS—RESERVATIONS—PART OF TERRITORY—SUBJECT TO LEGISLATIVE AND JUDICIAL CONTROL—REV. STATS. U. S. (ORGANIC ACT) 1878, SECS. 1839, 1840, CITED AND CONSTRUED.**—In absence of treaty or other express exclusion an Indian reservation becomes part of the territory for legislative and judicial control, subject, however, to the power of the general government to make regulations respecting the Indians, etc. Statutes, *supra*, cited and construed. (*Territory v. Delinquent Tax List*, 302.)

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INJUNCTIONS.

1. INJUNCTIONS—BOND—DAMAGES—COUNSEL FEES—COMP. LAWS ARIZ. 1877, SECS. 2544-2555, CITED AND CONSTRUED.—Counsel fees are not recoverable upon an injunction bond conditioned, as provided by statutes, *supra*, that the plaintiff will pay such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled to the injunction. (*Greer v. Richards*, 227.)
2. INJUNCTIONS—PRACTICE—APPEALS—GOVERNED BY CODE CIVIL PROCEDURE—REV. STATS. ARIZ. 1887, PAR. 2144, CONSTRUED.—Paragraph 2144, *supra*, permits the supplying of any matter of practice or procedure in injunction suits, provisions for which have not been made by the code, and that in supplying such omissions the rules generally prevalent in courts of equity shall govern. The right to appeal in injunction cases is given and regulated by the Code of Civil Procedure. (*Keyser v. Shute*, 336.)

See Irrigation, 2.

INSTRUCTIONS TO JURY. See Criminal Law, 4, 5, 10, 14; Negligence, 1; Sales, 2.

## INTEREST.

None upon taxes unless imposed by statute. See Taxes, 1.

## INNUENDO.

Proof must conform thereto. See Libel, 1.

When necessary. See Libel, 2.

When surplusage. See Libel, 2.

## IRRIGATION.

1. IRRIGATION—CONTRACTS—COMPANY REGULATIONS—JUDGMENT—PRORATING WATER.—Where an irrigation company has contracted to furnish a water-user for all time water sufficient to irrigate one hundred and sixty acres of land, and such water-user is the first to purchase and the first to beneficially use the water upon the land, it is error for the court to decree that he shall be subject to the same rules and shall prorate his water with parties who purchased at subsequent times. (*Hargrave v. Hall*, 252.)
2. SAME—TRESPASS—INJUNCTION—DAMAGES.—Where an irrigation company, without justification, has destroyed a water-user's head-gates and damaged his crops he is entitled to an injunction, damages and costs. (*Hargrave v. Hall*, 252.)
3. IRRIGATION—PUBLIC POLICY—WATERS PUBLIC—PRIVATE OWNERSHIP—PRIVATE CONTROL—REV. STATS. ARIZ. 1887, PAR. 2863, 3198, 3201, 3202, CITED.—It is the policy of this territory to make the use of water within the reach of all, and to guard it against monopoly

## IRRIGATION (Continued).

by private ownership on the one hand, and against being hemmed in by the ownership of the adjacent land on the other. (*Oury v. Goodwin*, 255.)

4. **SAME—EMINENT DOMAIN—RIGHT OF WAY FOR DITCHES—CONSTITUTIONALITY—REV. STATS. ARIZ., TITLE 22, "EMINENT DOMAIN," CITED AND HELD CONSTITUTIONAL.**—Title 22, "Eminent Domain," providing for the acquirement of a right of way for ditches to supply farming neighborhoods with water, is in accord with the public policy of the territory and is not in contravention of the constitution of the United States, the organic act of the territory, or any act of Congress. (*Oury v. Goodwin*, 255.)
5. **IRRIGATION—WRONGFUL DIVERSION—DAMAGES—DEFENSES—TENANCY OF LICENSE TERMINATED BY ADVERSE HOLDING.**—In an action for damages for the wrongful diversion of water from plaintiff's land by defendant it is no defense for defendant to claim as tenant or licensee of plaintiff where it appears that he had terminated his relations with plaintiff by "jumping" the land on which he was as tenant or by license and holding adversely to plaintiff. (*Brash v. White*, 212.)

## ISSUE OF FACT.

What constitutes. See Mortgages, 4.

## JUDGMENTS.

1. **JUDGMENTS—COURTS OF RECORD—IMPORT VERITY—OMISSIONS—PRESUMPTION AS TO JURISDICTION.**—A domestic judgment of a court of record, unless directly impeached, imports absolute verity as to every jurisdictional fact of which the record speaks, and is clothed in the conclusive presumption that every jurisdictional fact exists of which the record may be silent. (*Bryan v. Kales*, 423.)
2. **SAME—COLLATERAL ATTACK—PRESUMPTIONS—IDENTITY OF PERSONS CANNOT BE PRESUMED FROM IDENTITY OF NAMES.**—Where the judgment of a court of record that one M. W. Kales sued M. W. Kales, administrator, there is no presumption from the identity of names that there is identity of person, and such judgment is not open to collateral attack, it being on its face regularly entered in a cause of which the court had jurisdiction of the subject-matter, and presumptively of the parties. (*Bryan v. Kales*, 423.)
3. **JUDGMENTS—IDENTITY OF NAMES OF PARTIES—PRESUMPTION IN FAVOR OF REGULARITY OVERCOMES PRESUMPTION OF IDENTITY OF PERSON ARISING FROM IDENTITY OF NAME.**—The presumption in favor of the regularity and validity of the proceedings of a court of general jurisdiction is sufficiently strong to overcome the presumption of identity of person, arising from identity of name in a judgment or decree, where the same is offered in evidence. (*Bryan v. Brasius*, 433.)

**JUDGMENTS (Continued).**

4. **SAME—COLLATERAL ATTACK—ADMISSION OF INVALIDITY.**—In an action seeking to eject parties holding under judgment of foreclosure, it is competent for the parties to admit that the plaintiff and defendant in the foreclosure proceedings were one and the same party. (*Bryan v. Brasius*, 433.)
5. **SAME—FORECLOSURE—IDENTITY OF PERSONS—PURCHASERS NOT CHARGEABLE WITH NOTICE FROM IDENTITY OF NAME—PRESUMPTIONS.**—Where purchasers under judgment of foreclosure have no actual knowledge or notice that the plaintiff and defendant in the foreclosure proceedings were one and the same party, they are not chargeable with notice of the identity of person as there is no presumption of identity of person from identity of name, where a judgment of a court of general jurisdiction shows the same name as plaintiff and defendant. (*Bryan v. Brasius*, 433.)

See Appeal and Error, 27, 61, 72; Corporations, 3; Mortgages, 2.

**JUDGMENT-ROLL.**

Review confined to, where there is no bill of exceptions, statement of facts or motion for new trial, in record. (*Smith v. Blackmore*, 348.)

See Appeal and Error, 12.

**JURISDICTION.** See Appeal and Error, 13, 34, 43, 45, 48; Forcible Entry and Detainer, 2; Public Lands, 4; Taxation, 4.

**JURY.**

1. **JURY—APPEAL AND ERROR—CHALLENGES—HARMLESS ERROR.**—The refusal of a proper challenge for cause is not reversible error when there remain unexhausted challenges at the time of going to trial. (*Territory v. Shankland*, 403.)
2. **JURY—PROVINCE OF—REMARKS OF JUDGE.**—The remark of the judge, that the affidavit of the witness could not be considered as bearing upon his credibility, was the statement of the law, and in no way trespassed upon the province of the jury. (*Territory v. Clanton*, 1.)
3. **JURY—SPECIAL VENIRES—REV. STATS. ARIZ. 1887, SECS. 2175 ET SEQ., CONSTRUED.**—Where special venires are issued in term, directed to the sheriff to serve, and the names returned are properly put in the box, and drawn by the clerk, the proceedings are regular under statutes, *supra*, and the jury properly summoned. (*Territory v. Clanton*, 1.)
4. **JURY.**—Cannot impeach their own verdict. See Criminal Law, 8, 13. See Appeal and Error, 55.



## JURY TRIAL.

1. JURY TRIAL—RIGHT TO DEMAND IN LAW CASES—POWER OF LEGISLATURE TO FIX REASONABLE TIME FOR DEMAND.—The right to trial by jury in law cases is one sacredly to be observed. It is competent for the legislature to fix the time within which the demand shall be made, if it be a reasonable time. (*Lemon & McCabe v. Ward*, 219.)
2. SAME—DEMAND—WHEN MADE—REV. STATS. ARIZ. 1887, PAR. 757, CITED—APPEAL AND ERROR—RECORD—MUST SHOW ERROR CLEARLY—PRESUMPTION.—When a case has been dismissed on appellant's motion after his demand and deposit for a jury and is reinstated after some two months and a new demand and deposit for a jury trial is made just before trial it is not error for the trial court to refuse a jury, the second demand not having been made in apt time and the record not showing that the first demand and deposit continued in force up to the time of trial. It is incumbent on the appellant to make a clear case of error and if the record is obscure or ambiguous the presumption is in favor of the correctness of the ruling of the trial court. (*Lemon & McCabe v. Ward*, 219.)

LACHES. See Equity, 1.

## LANDS UNSURVEYED.

Unsurveyed lands assessed should be excluded. See Statutory Construction, 7.

## LARCENY.

1. LARCENY—EVIDENCE—IMPEACHING WITNESSES.—When a self-confessed accomplice had testified that the horse stolen was brought into camp by the brother of the accused, it was error for the trial court to refuse to permit the accused to ask the accomplice, "Did you not testify in the examining court that you really were the party that had taken the horse?" (*Territory v. Youree*, 346.)

## LEASE.

1. LEASE—WRITTEN AGREEMENT—PLEADING—PAROL CONTEMPORANEOUS AGREEMENT—EVIDENCE.—A written agreement to lease definite as to subject-matter, price, and term is complete within itself, and demurrer to an answer pleading a prior or contemporaneous verbal agreement is properly sustained, it being merged in the written agreement and cannot be varied by proof of a verbal understanding. (*Tietjen v. Snead*, 195.)

## LEGISLATURES.

1. LEGISLATURES—LENGTH OF SESSIONS—REV. STATS. U. S. 1878, SEC. 1852, AS AMENDED DECEMBER 23, 1880, BY 1 SUPP. R. S. U. S., P. 313, BEING CH. 7, 46TH CONGRESS, 3D SESSION, PAR. 16, ORGANIC ACT,

**LEGISLATURES** (Continued).

REV. STATS. ARIZ. 1901, CONSTRUED.—Statutes, *supra*, providing that "the sessions of the legislative assemblies of the several territories of the United States shall be limited to sixty days' duration," is mandatory and means a session of sixty legislative or working days, exclusive of Sundays, public holidays, and days of intermediate adjournment, not sixty consecutive days. (*Cheyney v. Smith*, 143.)

2. **LEGISLATURES.**—Legislature has power to fix reasonable time for demand for jury trial. See *Jury Trial*, 1.

See *Officers*, 2; *Statutes*, 1, 2.

**LEVY.**

What constitutes. See *Executions*, 2.

**LIBEL.**

1. **LIBEL—PLEADING—INNUEUDO—PROOF MUST CONFORM THERETO.**—Where words are not actionable *per se*, and the plaintiff places his version upon them in his pleading, he will be bound thereby, and his proof must conform thereto. (*Johnston v. Morrison*, 109.)
2. **SAME—SAME—WORDS NOT ACTIONABLE PER SE—NECESSITY FOR AN INNUEUDO—WHEN SURPLUSAGE.**—Where the libelous words, *prima facie*, are not actionable an innuendo is essential to the action. If actionable *per se*, the innuendo may be rejected as surplusage. (*Johnston v. Morrison*, 109.)

**LIMITATIONS OF ACTIONS.**

Bar does not affect payment of debt as condition of recovery. See *Ejectment*, 5.

**LOCATION.** See *Mines and Mining*, 1.

**LOCATION NOTICE.**

Recorded, makes *prima facie* title. See *Mines and Mining*, 2.

**MALICE.**

Question for jury. See *Malicious Prosecution*, 1.

**MALICIOUS PROSECUTION.**

1. **MALICIOUS PROSECUTION—ESSENTIAL ELEMENTS—WHAT CONSTITUTES PROBABLE CAUSE—QUESTION OF LAW—MALICE—POSSESSION OF GOODS RECENTLY STOLEN.**—In an action for malicious prosecution the essential elements are a criminal charge by defendant against plaintiff, made maliciously and without probable cause. Where the facts are admitted, probable cause is a question of law to be determined by the court; if disputed, the court by its charge will say

**MALICIOUS PROSECUTION (Continued).**

what facts found by the jury will constitute it. Malice is for the jury. The burden is on the plaintiff to prove, by a preponderance of the evidence, both malice and want of probable cause. Where coal recently stolen from defendant was found at plaintiff's house, the possession of such stolen goods amounts to probable cause and justifies a criminal charge. Though the possessor may be innocent, the prosecutor is not bound to seek for an explanation. (McDonald v. Atlantic etc. R. R. Co., 96.)

**MANDAMUS.**

1. **MANDAMUS—AGAINST GOVERNOR.**—*Mandamus* is a civil remedy for the protection of purely civil rights, and will not lie, at the instance of officials of a branch of the executive department, to compel the governor to perform a public duty. (Insane Asylum v. Wolfy, 132.)

**MATERIALITY.** See Evidence, 2, 3.

**MEXICAN GRANTS.**

1. **MEXICAN GRANTS—KINDS—STRICTLY CONSTRUED.**—Mexican grants are of three kinds: (1) specific boundaries, (2) by quantity, or (3) grants of a certain place by name, with or without boundaries. This grant is of the second class. The *expediente* partakes largely of the nature of a judicial sale, and should be strictly construed. The rule that where there is a doubt as to what is conveyed, and the boundary is certain, but disagrees with the quantity mentioned, the latter is disregarded, and cannot be invoked where its application would defeat the evident intent. (United States v. Cameron, 100.)

See Public Lands, 2, 3, 4.

**MINES AND MINING.**

1. **MINES AND MINING—LOCATION—CITIZENSHIP—PRESUMPTION FROM RESIDENCE.**—It will be presumed that a resident of the United States who has made a mining location was a citizen. (Jantzon v. The Arizona Copper Co., 6.)
2. **SAME—LOCATION NOTICE—RECORDED—EVIDENCE—PRIMA FACIE TITLE.**—Where it appears that a locator, at or near the time of location, recorded his location notice, reciting all the facts essential to a valid location, such evidence will make out a *prima facie* title. (Jantzon v. The Arizona Copper Co., 6.)
3. **SAME—MINING CLAIMS—POSSESSORY ACTIONS—EVIDENCE.**—The rule in ejectment that the plaintiff must recover on the strength of his own title and not on the weakness of the defendant's, does not apply to possessory actions for mining claims. Each must prove his claim to the premises in dispute, and the better right prevails. (Jantzon v. The Arizona Copper Co., 6.)

**MONEY HAD AND RECEIVED.**

1. **MONEY HAD AND RECEIVED.**—Where plaintiff holding funds belonging to defendant uses his own funds to pay defendant's obligations, he is entitled to recover the money so paid, he having in the mean time surrendered all funds of defendant's to another of its agents. (*Martin v. Wells, Fargo & Co.*, 57.)

**MORAL CERTAINTY.**

Proof to a, not required in criminal cases. See Criminal Law, 11, 15.

**MORTGAGEE IN POSSESSION.**

Rights of. See Ejectment, 3, 4.

Who equivalent to. See Ejectment, 2.

**MORTGAGES.**

1. **MORTGAGES—ACTION TO DECLARE DEED MORTGAGE—PAYMENT OR TENDER NOT REQUIRED.**—In an action to declare a deed absolute on its face a mortgage, prior payment or tender of the amount of the indebtedness is not required. (*Rees v. Rhodes*, 235.)
2. **SAME—SAME—EVIDENCE—UNSATISFIED JUDGMENT.**—A judgment against plaintiff, assigned to defendant prior to the execution of a deed from plaintiff to defendant, and still unsatisfied, is admissible, in an action to declare the deed a mortgage, for the purpose of showing the relation of the parties. (*Rees v. Rhodes*, 235.)
3. **MORTGAGES—FORECLOSURE—EXEMPTION OF HOMESTEAD—DEFENSE—ISSUE OF FACT—JUDGMENT ON DEMURRER—COMP. LAWS, ARIZ. 1877, CH. 37, SECS. 1 AND 2, CITED AND CONSTRUED.**—The homestead exemption provided by statute, *supra*, is a good defense to a foreclosure suit to enforce a mortgage, upon a homestead, executed by the husband alone. The plea of the statute raises an issue of fact to be determined by a trial, and judgment for plaintiff upon demurrer to the answer is error. (*Hancock v. Herrick*, 247.)
4. **SAME—SAME—REPLY BY WAY OF ESTOPPEL—ISSUE OF FACT.**—A reply to an answer pleading an exemption, setting up facts constituting an estoppel against defendants' plea, unless admitted, raises issues of fact, which can only be determined by trial. (*Hancock v. Herrick*, 247.)
5. **MORTGAGES—FORECLOSURE—OCCUPANTS—ESTOPPEL BY ACTS—POSSESSION—REMEDIES—WRIT OF ASSISTANCE.**—A decree of foreclosure had been rendered against the mortgagors of a piece of land, but after sale appellants were in possession and refused to vacate. Appellants derived possession from the mortgagors after the execution of the mortgage, and with full knowledge thereof, and had been parties to the foreclosure proceedings, but at their instance, and upon their disclaiming any interest under their deed, the cause was dismissed as to them. They now repudiate their disclaimer by

**MORTGAGES (Continued).**

remaining in possession and setting up an after-acquired title by homestead entry. Having obtained possession from the mortgagors, they are in privity with them, as their grantors, and their right of possession is subordinate to the right of the mortgagee. *Held*, the writ of assistance was properly awarded. Compare *Singer Manufacturing Co. v. Tillman et al.*, ante, p. 122, 21 Pac. 818. (*Anderson v. Thompson*, 62.)

See Ejectment, 2; Taxation, 2, 3.

**MOTION FOR NEW TRIAL.**

Failure to file in time. See Appeal and Error, 43, 50.

Must have been made, before appellate court can consider errors which are good ground for new trial. See Appeal and Error, 49, 65, 70.

When must be determined. See Appeal and Error, 4, 7.

See Appeal and Error, 8, 9, 21, 36, 46, 59.

**NEGLIGENCE.**

1. **NEGLIGENCE—COMPARATIVE—INSTRUCTIONS.**—An instruction that, if both parties were guilty of negligence in the premises, then the negligence of the one is to be balanced against the other, and the jury is to find for the party least guilty in this respect, is error. (*Prescott etc. R. R. Co. v. Rees*, 317.)

Defense in action for. See Damages, 2.

**NEGOTIABLE INSTRUMENTS.**

1. **NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER—PARTNERSHIP NOTE—EXECUTED WITHOUT CONSENT OF ALL PARTNERS VALID.**—The holder of a promissory note, executed by the member of a trading partnership having charge of its financial affairs to secure an extension on a loan made to another of the partners for the use and benefit of the firm, is a *bona fide* holder for value, though as between the partners the note may have been for the accommodation of the individual partner, without consideration, and made without the consent of the remaining partner. (*Lewis v. Hayden*, 277.)
2. **SAME—PARTNERSHIP NOTE—EXECUTED BY ONE PARTNER—VALID—INNOCENT HOLDER.**—In the hands of an innocent holder for value a promissory note made by one member of a trading partnership in the name of the firm is valid, notwithstanding it was not made in the usual course of the business of the firm, and that other partners did not give their consent and had no knowledge of its execution. (*Lewis v. Hayden*, 277.)

See Pleading, 4.

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**NEW TRIAL.**

1. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE—DILIGENCE.**—A motion for new trial based upon newly discovered evidence is properly overruled where it appears that the evidence would have been merely cumulative and would not have changed the result of the trial, and the affidavits in support thereof fail to show diligence in the procurement of the evidence. (*Lewis v. Hayden*, 277.)
2. **NEW TRIAL—PURPOSE OF—ISSUES OF FACT DETERMINED AT A FORMER TRIAL CANNOT BE CONSIDERED.**—The purpose of a new trial is to permit a re-examination and determination of issues of fact, and the granting of judgment by the trial court upon the pleadings because all the facts in issue were before the court upon the former trial is error. (*Hancock v. Herrick*, 247.)

See Appeal and Error, 8, 9.

**NONJOINER.** See Pleading, 7.

**NORTH DEFINED.** See Presumptions, 1.

**NOTE.** See Negotiable Instruments.

**NOTICE.**

Burden of proof is on assignee to show. See Assignments, 2.  
Constructive, what is not. See Assignments, 1. See Set-Off, 2.

**NOTICE OF APPEAL.**

Must be given during term at which final judgment is rendered.  
(*Hand v. Ruff*, 175.) See Appeal and Error, 48.

**NUNC PRO TUNC.**

Order unauthorized. See Appeal and Error, 51.

**OCCUPANT DEFINED.** See Public Lands, 8.

**OFFICERS.**

1. **OFFICERS—SUPERINTENDENT OF TERRITORIAL PRISON—APPOINTED BY GOVERNOR WITH CONSENT OF ASSEMBLY—REV. STATS. U. S., SEC. 1857 (ORGANIC ACT, REV. STATS. ARIZ. 1901, PAR. 23), CITED.**—The office of superintendent of the territorial prison is within the provisions of the statute, *supra*, and may only be filled by nomination by the governor and assent thereto by the legislative council. (*Behan v. Davis*, 399.)
2. **OFFICERS—TERRITORIAL COURTS—CLERK OF COURT—FEES—POWER OF LEGISLATURE.**—The clerk of the district court is not entitled in all cases to the fees as prescribed by the statutes of the United States.

**OFFICERS (Continued).**

The legislature has power to fix a salary for the business of the territorial court, having complete control of all cases except those in which the United States is a party. (*Pima County v. Martin*, 59.)  
See Appeal and Error, 6.

**ORGANIC ACT.**

1. **ORGANIC ACT—RELATION TO GOVERNMENT—CONSTRUCTION.**—The organic law of the territory bears the same relation to the government of the territory as the constitution of a state sustains to the people of the state. The same rules of construction apply to it as to a state constitution. (*Cheyney v. Smith*, 143.)

**PARTIES.**

1. **PARTIES—MUST BE ADVERSARY PARTIES—CANNOT SUE SELF IN REPRESENTATIVE CAPACITY.**—Adversary parties are essential in every cause. One may not sue himself. Neither may he sue himself in a representative capacity. (*Bryan v. Kales*, 423.)

Competent as witnesses. See Witnesses, 3.

Who necessary upon filing creditor's bill. See Assignment for Benefit of Creditors, 1.

**PARTNERSHIP.**

Note, executed without consent of all partners valid. See Negotiable Instruments, 1, 2.

**PATENTS.**

Salines and mines not included. See Public Lands, 5, 6.

**PAYMENT.**

Not required in an action to declare a deed a mortgage. See Mortgages, 1.

**PENALTIES.** See Statutory Construction, 6.**PLEADING.**

1. **PLEADING—ANSWERS—DEFENSES—ELECTION.**—A plea cannot rest in fraud and contract at one and the same time and both or either relied upon at the option of the pleader. (*Albuquerque Nat. Bank v. Stewart*, 293.)
2. **SAME—SAME—FRAUD—NECESSARY AVERMENTS.**—An answer setting up that the cashier of a bank represented to defendants, sureties upon a note, that the bank held certain collateral of the principals which it would apply to its payment and save them harmless, and that upon such agreement they were induced to and became sureties, does not raise the defense of fraud or fraudulent

**PLEADING (Continued).**

representations, because there is no allegation that the representations were untrue, nor that, relying upon such representations, they were thereby induced to become sureties, and would not otherwise have so become. (*Albuquerque Nat. Bank v. Stewart*, 293.)

3. **SAME—SAME—CONSTRUCTION.**—An answer containing elements of contract and fraud which fails to contain averments essential to the plea of fraud will be construed upon the theory of contract. (*Albuquerque Nat. Bank v. Stewart*, 293.)
4. **SAME—SAME—DEFENSES—NEGOTIABLE INSTRUMENTS—CONTEMPORANEOUS PAROL AGREEMENT VARYING.**—An answer to a suit upon a note, setting up a contemporaneous parol agreement between the cashier of a bank and sureties upon the note to make the note out of collateral held by the bank and to save them harmless, is bad as varying the terms of a written undertaking. (*Albuquerque Nat. Bank v. Stewart*, 293.)
5. **PLEADING—ARGUMENTATIVE.**—An answer which alleges the terms of an agreement argumentatively and inferentially and not directly is bad. (*Tietjen v. Snead*, 195.)
6. **PLEADING—EVIDENCE—RELEVANCY—VARIANCE.**—In an action upon an injunction bond evidence that the damages was interest on an indebtedness incurred by reason of deprivation of taxes is not permissible under a pleading alleging damages as interest on taxes enjoined. (*Greer v. Richards*, 227.)
7. **PLEADING—NONJOINER—WAIVER—COMP. LAWS. ARIZ., CHAP. 48, SEC. 40, P. 415, CITED.**—The objection that there was a nonjoinder of a necessary party should be taken either by a demurrer or an answer, and, this not having been done, that objection must be deemed waived. Statute, *supra*. (*Stiles v. Samaniego*, 48.)
8. **PLEADING—SET-OFF AND COUNTERCLAIM—ACCOUNT—NECESSITY FOR PLEADING ITEMS—REV. STATS. ARIZ. 1887, PAR. 737, CONSTRUED.**—Under statute, *supra*, providing that "the plea setting up such counterclaims shall state distinctly the nature and several items thereof, and shall conform to the ordinary rules of pleading," no greater degree of particularity is required in setting forth the nature and various items of a claim when pleaded by way of set-off than when pleaded in a complaint. (*United States v. Tidball*, 384.)

See Action to Quiet Title, 1; Corporations, 1; Fraud, 1, 4; Lease, 1; Libel, 1, 2.

**PRACTICE.**

Motion to dismiss appeal. See Appeal and Error, 5, 30, 31; Injunctions, 2.

**PRACTICE IN SUPREME COURTS.** See Courts, 3.



**PRE-EMPTION.** See Public Lands, 5, 6, 7.

**PREFERENCES.**

Confession of judgment; who may complain; voidable; not subject to collateral attack. See Corporations, 4.

**PROCEDURE.** See Criminal Law, 12.

**PRESUMPTIONS.**

1. **PRESUMPTIONS—NORTH DEFINED.**—In the absence of overwhelming evidence to the contrary, "north" will be construed as meaning true north, as distinguished from magnetic north. (*Ryder v. Leach*, 129.)

See Appeal and Error, 32, 44, 66, 68; Corporations, 2; Courts, 1; Evidence, 2, 5; Judgments, 1, 2, 3, 5; Jury Trial, 2; Mines and Mining, 1.

**PRINCIPAL AND AGENT.**

1. **PRINCIPAL AND AGENT—UNDISCLOSED DUAL AGENCY—CONTRACT—SPECIFIC PERFORMANCE.**—An agent cannot enforce specific performance of a contract for his own benefit respecting the subject-matter of his agency where he has secretly acted for both parties. (*Jacobs v. George*, 9.)
2. **PRINCIPAL AND AGENT—AGENT ENTITLED TO COMMISSION NOT PART OWNER—TRUSTEE AS TO REMAINDER.**—(*Territory v. Meyer*, 199.)

See Criminal Law, 5, 6.

**PROBABLE CAUSE.**

What constitutes, question of law. See Malicious Prosecution, 1.

**PROCEDURE.** See Actions, 1.

**PUBLIC LANDS.**

1. **PUBLIC LANDS—FENCING—COLOR OF TITLE—NO ADVERSE POSSESSION AS AGAINST THE UNITED STATES—GRANT—CONSTRUCTION—COLOR BY DEED LIMITED—COLOR DEFINED—"CLAIM OR COLOR" MEANS COLOR OF TITLE—VALIDITY TO BE DETERMINED BY COURT—EVIDENCE REVIEWED AND FENCE HELD UNLAWFUL INCLOSURE UNDER ACT OF FEB. 25, 1885, CH. 149, SECS. 1, 2, 23 U. S. STATS. AT LARGE, 321.**—Defendant claims to own the land fenced under grant. He had no exclusive occupation prior to the building of the fence, nor can he hold by trespass, and acquire adverse title as against the United States and defend the right to fence by claim or color of title so acquired. His claim or color of title is based on his paper title, which is the *expediente*. No one can claim color of title by deed, when entering upon land, beyond what his deed purports to convey.

## PUBLIC LANDS (Continued).

Color of title is where there is an apparent colorable title under which an entry or claim has been made in good faith. "Claim and color" mean the same as color of title. Where the defendant claims the right to fence upon a claim or color of title derived from paper title, the court has the power to ascertain the extent thereof, but not the validity of the grant, and when it further appears that the lands fenced are far from the lands described therein and include no lands ever occupied by, or in the possession of, the defendant under the deed, such cannot be a claim or color of title and the fence so erected is an unlawful inclosure of the public lands. (*United States v. Cameron*, 100.)

2. PUBLIC LANDS—MEXICAN GRANT—EVIDENCE—REPORT OF SURVEYOR-GENERAL—ACT JULY 15, 1870 (16 STATS. AT LARGE, 304), AND ACT JULY 22, 1854, CITED.—The report of the surveyor-general upon a Mexican grant is not competent evidence for any purpose. (*United States v. Cameron*, 100.)
3. SAME—SAME—WITHDRAWAL—ACT OF 1870.—Act of 1870, *supra*, does not confer power upon the surveyor-general or the secretary of the interior to reserve from sale lands claimed to be within a valid Mexican grant. (*United States v. Cameron*, 100.)
4. PUBLIC LANDS—MEXICAN GRANT—JURISDICTION—COURTS—SURVEYOR-GENERAL—ACT OF JULY 22, 1854—ACT OF JULY 15, 1870, 16 U. S. STATS. AT LARGE, 291, CITED AND CONSTRUED.—Congress has conferred no jurisdiction on the courts of the territory to determine the validity of Spanish or Mexican grants. The statutes, *supra*, invest the surveyor-general with power to settle, primarily, these questions. (*Astiazaran v. Santa Rita Land etc. Co.*, 20.)
5. PUBLIC LANDS—PRE-EMPTION—PATENTS—SALINES AND MINES NOT INCLUDED—SEC. 2258, REV. STATS. U. S., CONSTRUED.—Under section 2258, Revised Statutes of the United States, providing that lands, upon which are situated any "known salines or mines," shall not be subject to pre-emption, the land department has no power to convey the legal title to known mines by patent obtained under pre-emption entry. (*Kansas City M. and M. Co. v. Clay*, 326.)
6. SAME—SAME—SAME—SAME—PATENT NOT CONCLUSIVE AS TO MINES.—Whether or not land contains "known salines or mines" is not a fact which is required to be shown at the time of making a pre-emption entry, and the patent is therefore not conclusive thereon. (*Kansas City M. and M. Co. v. Clay*, 326.)
7. SAME—SAME—EJECTMENT—COLLATERAL ATTACK ON PATENT—CHARACTER AS CONVEYANCE OF KNOWN MINES.—When one, claiming under a patent issued upon a pre-emption, brings ejectment to recover a mine within the boundaries of the land granted, the defendant may attack the patent collaterally by proof that mines were known to exist at the time of its issuance, and thereby defeat

**PUBLIC LANDS (Continued).**

its character as a conveyance of such mines. (*Kansas City M. and M. Co. v. Clay*, 326.)

8. **PUBLIC LANDS—TOWN-SITES—ACT OF CONGRESS, MARCH 2, 1867, CITED—ENTRY IN TRUST—DEEDS TO ACTUAL OCCUPANTS—PRESUMPTION—OCCUPANT DEFINED.**—Under the act of Congress, *supra*, the probate judge of any county in Arizona has the power to enter land occupied as a town-site, and hold it in trust to be deeded to the actual occupants. In the absence of anything to the contrary, it will be presumed that when he has made a deed it was to the proper person, and one not interested in the land cannot question his acts. An "occupant," within the meaning of the act, is one who is a settler or resident of the town, and in the actual *bona fide* possession of the lot at the time the entry was made. (*Singer Mfg. Co. v. Tillman*, 122.)

**PUBLIC NECESSITY.**

Defined. See Eminent Domain, 4.

**PUBLIC POLICY.** See Eminent Domain, 3; Irrigation, 3.

**PUBLIC USE.**

How determined. See Eminent Domain, 2; Statutes, 1.

**RAPE.**

1. **RAPE—ASSAULT WITH INTENT TO COMMIT—EVIDENCE—COMPLAINT OF PROSECUTRIX.**—In a prosecution for assault with intent to commit rape evidence that the prosecutrix made complaint should be limited to that fact. Evidence as to the details of such statement inadmissible. (*Territory v. Kirby*, 288.)

**REAL PROPERTY.**

1. **REAL PROPERTY—BUILDING HOUSE UPON LAND OF THIRD PARTY WITHOUT AGREEMENT.**—A house built by one person upon the land of another, without any authority or agreement in respect thereto, becomes a part of the realty, and the property vests in the owner of the soil. (*Prescott etc. R. R. Co. v. Rees*, 317.)

**REASONABLE DOUBT.**

All reasonable doubt of defendant's guilt must be removed; no more. See Criminal Law, 11, 15.

**RECORD.**

What constitutes. See Appeal and Error, 38, 55.

See Appeal and Error, 4, 12, 26, 31, 42, 53, 56, 70; Courts, 1, 2; Jury Trial, 2.

**REHEARING.**

1. **REHEARING—PURPOSE OF.**—The purpose of a rehearing is not to open the whole case, but to afford an opportunity for the court to correct any misapprehension of the record, or any oversight or omission inadvertently made. *Arizona Prince Copper Co. v. Copper Queen Copper Co.*, 2 Ariz. 169, 11 Pac. 396, cited. (Territory v. Delinquent Tax List, 69.)

**RELEVANCY.** See Evidence, 6, 7; Pleading, 6.

**REPEAL.** See Appeal and Error, 7.

**REPLY.** See Mortgages, 4.

**REPORTERS' NOTES.**

Not a substitute for bill of exceptions or statement of facts.  
(Territory v. Kay, 92.)

See Appeal and Error.

**REPUTATION.**

General, only may be proved. See Criminal Law, 12.

**RETURN.**

Binding upon judgment creditor. See Executions, 3.

**REVIEW.**

Scope of. See Appeal and Error, 12, 25, 36, 46, 60, 61.

See Appeal and Error, 62, 63; Contempt, 1; Criminal Law, 1; Venue, 1.

**RIGHT TO TRIAL BY JURY.** See Actions, 1.

**ROLLING STOCK.**

*Situs* of, how determined. See Statutory Construction, 4.

**SALES.**

1. **SALES—BREACH OF CONTRACT—VENDOR'S REMEDIES—MEASURE OF DAMAGES.**—For a breach of a valid contract of sale of chattels by the vendee, in failing to accept and pay the contract price, the vendor may treat the contract as a complete sale, and at his option, either store the goods as the property of the vendee, or within a reasonable time resell in the open market. If he hold the property for the vendee he may recover the full contract price. If he resells, the law deems him agent of the vendee, and he may apply the proceeds as payment *pro tanto*, and, if less than the contract price, recover the difference. He may also treat the contract as executory, and the sale as not having vested title in the vendee, and retain

**SALES (Continued).**

the property as his own, and may sue and recover any loss of profit had the contract price been paid. This would be the difference between the contract price and the market value at the time and place of delivery. (*Slaughter v. Marlow*, 429.)

2. **SAME—ELECTION OF REMEDY—RESALE—EVIDENCE—MEASURE OF DAMAGES—INSTRUCTIONS.**—Where the vendors plead they have resold the property and ask the difference between the contract price and the amount they have realized from the sale, they have elected their remedy, and must show the amount realized from the sale. The measure of damages is the difference between the contract price and the actual amount realized from the sale in excess of the necessary and proper expenses of the sale and the keep of the property, and an instruction that the measure of damages is the difference between the contract price and the market value at the time and place of delivery is error. (*Slaughter v. Marlow*, 429.)

See Fraud, 2.

**SET-OFF.**

1. **SET-OFF—POWER OF COURT NOT STATUTORY—DISCRETIONARY—REVIEWED ONLY FOR ABUSE.**—The power of a court to set-off mutual judgments is inherent. It rests upon its general jurisdiction over its judgments, not upon statute. The exercise of the power is discretionary and will be reviewed only for abuse. (*Martin v. Wells, Fargo & Co.*, 355.)
2. **SAME—ASSIGNMENTS—NOTICE—SEC. 5, CH. 48, COMPILED LAWS ARIZ. 1877, CONSTRUED.**—Statute, *supra*, expresses the equitable doctrine of assignment, that is: that it carries with it all existing equities together with any which may thereafter arise between the assignor and his debtor before notice of the assignment to the latter which might be urged by him as a proper set-off. (*Martin v. Wells, Fargo & Co.*, 355.)

See Pleading, 8.

**SHERIFFS.**

1. **SHERIFFS—FEES FOR EXECUTING A WRIT OF ARREST—REV. STATS. ARIZ., PAR. 579, CLAUSE 3, AND 1972, CONSTRUED—EXPENSES FOR RETURNING PRISONER.**—Under statutes, *supra*, for the arrest of a prisoner, and removing him to the court whence the writ issued, the only compensation to be allowed to the sheriff is two dollars for the service of the writ, and thirty cents for each mile, counting one way only, necessarily traveled in effecting such arrest and removal. In addition the sheriff is entitled to his expenses, other than personal, incurred in returning his prisoner. (*Yavapai County v. O'Neill*, 363.)
2. **SAME—FEES—SERVING SUBPENAS OUTSIDE OF COUNTY—MUST BE INDORSED UNDER PROVISIONS OF REV. STATS. ARIZ. 1887, PENAL CODE,**

**SHERIFFS (Continued).**

PAR. 2054, CITED.—The sheriff is not bound to serve a writ of subpoena in a criminal case upon a witness non-resident of the county where the trial is to be had unless it be indorsed by the trial judge as provided by statute, *supra*, and no fee for service of writ not so indorsed can be allowed as a legal county charge. (Yavapai County v. O'Neill, 363.)

3. SAME—SAME—MILEAGE IN UNSUCCESSFUL ATTEMPTS TO ARREST NOT ALLOWED—REV. STATS. ARIZ. 1887, PAR. 1972, CITED AND CONSTRUED.—Fees for mileage traveled in unsuccessful attempts to execute warrants of arrest will not be allowed. (Yavapai County v. O'Neill, 363.)

**SHERIFF'S FEES.**

1. SHERIFF'S FEES—EXECUTING WARRANT OF ARREST—OUTSIDE OF TERRITORY—REV. STATS. ARIZ. 1887, PARS. 1972 AND 1277, CITED.—To execute a warrant of arrest is to actually effect the arrest by virtue of and in obedience to the mandate of the writ, and make of the person therein named the disposition required. A warrant of arrest issued out of any court in this territory cannot be executed, in a legal sense, outside of the territory. No fee can be, under the statutes, *supra*, charged for travel beyond the territory in the execution of a warrant of arrest. (Yavapai County v. O'Neill, 363.)

**SPECIAL TERM.**

Convening order, authority for holding, record must show. See Courts, 1, 2.

**SPECIFIC PERFORMANCE.** See Principal and Agent, 1.

**STATEMENT OF FACTS.**

Contents. See Appeal and Error, 41.

Must be signed by trial judge. See Appeal and Error, 64.

Time for filing. See Appeal and Error, 40, 69.

See Appeal and Error, 12, 23, 31, 56.

**STATUTES.**

1. STATUTES—CONSTRUCTION—EMINENT DOMAIN—LEGISLATURE—TO DETERMINE WHAT IS PUBLIC USE—DUTY OF COURT TO ENFORCE UNLESS CLEARLY UNCONSTITUTIONAL—EFFECT, LEGISLATIVE QUESTION.—It is in the first instance for the legislature to declare what are public uses to which private property may be appropriated. If such statute is constitutional, it is the duty of the court to enforce it. If there are doubts as to its constitutionality, if not clearly unconstitutional, being the act of a co-ordinate branch of the government, the courts should treat it as valid. If the law is unwise or oppressive, the power that created it must be looked to for its repeal. (Oury v. Goodwin, 255.)

## STATUTES (Continued).

2. **STATUTES—CONSTRUCTION—LEGISLATIVE.**—The contemporaneous construction of a constitutional provision put upon it by the authority for whose guidance it was intended, particularly if acquiesced in for a long term of years, should be followed by the court. (*Cheyney v. Smith*, 143.)
3. **SAME—CONSTITUTIONALITY PRESUMED.**—A legislative act will be presumed constitutional till the contrary clearly appears. (*Cheyney v. Smith*, 143.)
4. **STATUTES—STATUTE PART OF CONTRACT—REPEAL—IMPAIRING OBLIGATION OF CONTRACT.**—A statute in force at the time a bond is given becomes a part of the contract and any subsequent act of the legislature cannot vary the contract without the consent of the sureties. (*County of Cochise v. Ritter*, 208.)

See Appeal and Error, 7.)

## STATUTORY CONSTRUCTION.

1. **STATUTORY CONSTRUCTION—ADOPTION OF STATUTE OF ANOTHER STATE—JUDICIAL INTERPRETATION BY COURTS OF SUCH STATE PRIOR TO ENACTMENT ALSO ADOPTED.**—Where the territory has adopted a statute of another state and such statute has been construed by decisions of that state, promulgated before it was enacted by this territory, such construction is also adopted. (*Territory v. Delinquent Tax List*, 117.)
2. **SAME—EXCESSIVE—POWER OF COURT LIMITED—FRAUD.**—The district court in such cases has no power to rectify excessive taxation, except in cases of fraud. (*Territory v. Delinquent Tax List*, 117.)
3. **SAME—SAME—EQUALIZATION—POWER OF BOARD OF SUPERVISORS—REV. STATS. ARIZ. 1887, PAR. 2649, CONSTRUED.**—Where the board of supervisors are empowered to act as a board of equalization by statute, *supra*, and to hear objections to assessments, there is a necessary implied power that they decide the same and carry the decision into effect. (*Territory v. Delinquent Tax List*, 117.)
4. **SAME—EXEMPTION—RAILWAY RIGHT OF WAY—IMPROVEMENTS—SITUS OF ROLLING-STOCK—RAILWAY CO. V. LESUER, 2 ARIZ. 428, 19 PAC. 157, FOLLOWED.**—The exemption of a right of way belonging to a railroad does not carry with it the exemption of improvements attached thereto. *Railway Co. v. Lesuer*, *supra*, followed. This case also determines the *situs* of rolling-stock. (*Territory v. Delinquent Tax List*, 117.)
5. **SAME—ASSESSMENT—HOW MADE—EVIDENCE—WHAT ASSESSED.**—Where the statute provides that assessments shall be made upon various enumerated items, it does not mean that the value of each item by which the conclusion is reached shall appear on the assessment-roll. It means that they shall be considered. Where it appears the right of way and franchise were not regarded as taxable,

**STATUTORY CONSTRUCTION (Continued).**

the record shows the value of these is not included. (Territory v. Delinquent Tax List, 117.)

6. **SAME—PENALTIES—GROSS AMOUNT.**—Penalties and percentages should not be fixed at a gross amount and imposed upon the tax upon both the railway and lands. (Territory v. Delinquent Tax List, 117.)

7. **SAME—UNSURVEYED LANDS.**—Unsurveyed lands assessed should be excluded. (Territory v. Delinquent Tax List, 117.)

See Appeal and Error, 45; Courts, 4.

**STOCKHOLDERS.**

Liability for unpaid subscriptions. See Corporations, 1.

**SUBROGATION.**

Assignee of certificate of sale subrogated to rights of mortgagee.

See Ejectment, 2.

**SUPERINTENDENT OF TERRITORIAL PRISON.**

How appointed. See Officers, 1.

**SUPREME COURT.**

No power to make rules. See Courts, 3.

**SURETY.**

Withdrawal of one, releases all, and a new bond must be given. (County of Cochise v. Ritter, 208.)

See Appeal and Error, 6.

**SURVEYOR-GENERAL.**

Report of, upon Mexican grant not competent evidence for any purpose. See Public Lands, 2.

**TAXATION.**

1. **TAXATION—ACTION FOR THE COLLECTION OF DELINQUENT TAXES—REV. STATS. ARIZ. 1887, TITLE 56, CH. 7, CITED AND CONSTRUED—PROCEEDING IN REM—APPEARANCES GENERAL—OBJECTION LIMITED TO LEGALITY OF TAX.**—Proceedings under the statute, *supra*, to collect delinquent taxes are proceedings *in rem*. Any party appearing does so voluntarily, and thereby waives all objections save as to the legality of the tax. (Territory v. Delinquent Tax List, 117.)

2. **TAXATION—ASSESSMENT—VALUATION—MORTGAGE.**—Real estate is properly assessed for its full value, and no deduction should be made by reason of a mortgage. (Territory v. Delinquent Tax List, 179.)

3. **SAME—MORTGAGE—INCIDENT OF DEBT—PROMISSORY NOTE HELD BY**



## TAXATION (Continued).

NON-RESIDENT—TAXABLE ONLY AT PLACE OF RESIDENCE.—A mortgage has no existence independent of the debt which it secures. Where the thing sought to be taxed is a debt due from a resident to a non-resident, and evidenced by a promissory note such tax is void, the *situs* of the note for the purpose of taxation being the place of residence of the owner. (Territory v. Delinquent Tax List, 179.)

4. TAXATION—COLLECTION BY SUIT—SPECIAL PROCEEDING IN REM—JURISDICTION OF COURT SPECIAL.—The collection of taxes is a special proceeding *in rem*. When this special power is conferred on courts they are treated, in the exercise of it, as courts of special jurisdiction. (Territory v. Delinquent Tax List, 69.)
5. TAXATION—DELINQUENT TAXES—JURISDICTION—SPECIAL TERM—REV. STATS. ARIZ. 1887, PARS. 2685, 628, CITED AND CONSTRUED.—The Revenue Act (par. 2685, *supra*), provides that the tax-collector must publish, with the delinquent list, a notice that he will apply to the district court "at the next ensuing term thereof" for judgment and order of sale of the property described, and also give notice "that on the Monday next succeeding the day fixed by law for the commencement of such term" such property will be sold. Regular terms of the district court commence on the first Monday in July of each year. Paragraph 628, *supra*, provides that special terms of the district court may be held "whenever in the judgment of the presiding judge of said court public justice demands it," and that notice be given by the clerk upon the order of the judge by publication. The proceeding contemplated by the revenue law, being special, should be strictly construed and every material provision of the statute complied with. The term "fixed by law" must be the regular term of court as fixed by statute. Special terms cannot embrace special proceedings requiring fixedness of time. (Territory v. Delinquent Tax List, 69.)
6. TAXATION—PROPERTY WITHIN EXCLUSIVE JURISDICTION OF UNITED STATES—CANNOT BE TAXED BY TERRITORIES.—Property situate wholly within boundaries exclusively within the jurisdiction of the legislative power of the United States cannot be taxed by the territory within which it may be situate. (Territory v. Delinquent Tax List, 302.)
7. TAXATION—PROPERTY WITHIN INDIAN RESERVATION.—A railroad-track and the right of way, granted by the government with the consent of the Indians, within an Indian reservation, not expressly excluded from territorial jurisdiction, is subject to taxation by the territory. (Territory v. Delinquent Tax List, 302.)
8. TAXATION—EXCESSIVE—POWER OF COURT LIMITED—FRAUD.—The district court has no power to rectify excessive taxation except in cases of fraud. See Statutory Construction, 2.  
See Statutory Construction, 3, 4, 5, 6, 7.

**TAXES.**

1. **TAXES—INTEREST.**—Taxes do not bear interest unless imposed by statute. (*Greer v. Richards*, 227.)

**TELEGRAM.**

Contents of parol evidence, and proper foundation must be laid before admissible. See Evidence, 1.

**TENDER.**

Not required in an action to declare a deed a mortgage. See Mortgages, 1.

**TERM.**

Presumption as to end of. See Appeal and Error, 44.

**TITLE.**

1. **TITLE—PURCHASE OF OUTSTANDING TITLE—ESTOPPEL.**—Purchase, by one in possession and claiming ownership, of another's claim of title, does not admit title in the grantor, and such purchaser is not estopped thereby to deny the validity of the claim thus purchased. Compare *Anderson v. Thompson et al.*, *ante*, p. 62, 20 Pac. 803. (*Singer Mfg. Co. v. Tillman*, 122.)  
False representations as to. See Fraud, 1.  
*Prima facie*, what constitutes. See Mines and Mining, 2.

**TOWNSITES.** See Public Lands, 8.

**TRANSCRIPT OF EVIDENCE.** See Appeal and Error, 23.

**TRESPASS.** See Irrigation, 2.

**TRIAL.**

1. **TRIAL—CONTINUANCE—COUNTER-AFFIDAVITS.**—Counter-affidavits to those in support of an application for a continuance may be allowed. (*Territory v. Shankland*, 403.)
2. **TRIAL—EXCLUSION OF WITNESSES.**—The exclusion of witnesses is solely a matter of discretion. (*Territory v. Dooley*, 60.)  
Denial of motion for new trial, conclusion of. See Appeal and Error, 51.  
See Appeal and Error, 32.

**TRUSTEE.** See Criminal Law, 6; Principal and Agent, 2.

**UNITED STATES SUPREME COURT.**

Decisions binding on territorial courts. See Courts, 4.

VALUATION. See Taxation, 2.

VARIANCE. See Pleading, 6.

VENDOR.

Remedies of. See Sales, 1.

VENUE.

1. VENUE—CHANGE OF—DISCRETIONARY—REV. STATS. ARIZ. 1887, PAR-1568, PENAL CODE, CITED—APPEAL AND ERROR—REVIEW—ABUSE OF DISCRETION.—A motion for a change of venue is addressed to the discretion of the trial judge. Paragraph 1568, *supra*, cited. It is competent for this court to look into the whole case, upon review of such motion, based upon the ground that the applicant cannot have a fair and impartial trial, to determine whether the exercise of discretion was wrongful and to the prejudice of the defendant, and when it appears that the evidence leaves no doubt as to the legal guilt of the defendant, and the defendant did not exhaust his peremptory challenges before he accepted the jury, though ordinarily the showing made for the change would have required a reversal for abuse of discretion in its refusal, the judgment will be affirmed. (*Territory v. Shankland*, 403.)

VERACITY.

Character, general reputation of witness in neighborhood of his residence for truth and veracity, all that may be proved. See Criminal Law, 12.

VERDICT.

1. VERDICT.—The verdict of a jury in an equity case is not advisory, the judgment of the court must follow it, or the judge must set it aside as erroneous and order a new trial. (*Rees v. Rhodes*, 235.)  
See Appeal and Error, 24, 71; Criminal Law, 8, 9.

WAIVER OF ERRORS.

1. WAIVER OF ERRORS.—Error in refusing to give an instruction, which was made one ground for motion for new trial is waived by failure to include it in record. Even if in record, it is waived if not complained of in brief. (*Albuquerque Nat. Bank v. Stewart*, 293.)  
See Appeal and Error, 4, 5, 28, 29, 63, 65; Criminal Law, 10; Pleading, 7.

WATER AND WATER RIGHTS. See Irrigation, 1, 3.

WITNESSES.

1. WITNESSES—CREDIBILITY.—The testimony of a witness who disputes his own record, made long before and at the time the acts recited

**WITNESSES (Continued).**

therein were reported as done, to discredit a title based thereon, should be disregarded as unworthy of belief. (*Jantzon v. The Arizona Copper Co.*, 6.)

2. **WITNESSES—IMPEACHMENT—CONTRADICTION UPON IMMATERIAL MATTER**—REV. STATS. 1887, SEC. 2055, CRIMINAL CODE, CITED.—Where the prosecuting witness made affidavit of poverty under statute, *supra*, such affidavit, not being material to the issue, was inadmissible. A witness can be contradicted only upon a matter material to the issue. (*Territory v. Clanton*, 1.)

3. **WITNESSES—PARTIES—COMPETENT**.—Where a party is upon the stand as any other witness, he is competent to testify upon all matters material to the issues. (*Johnston v. Morrison*, 109.)

Exclusion of, discretionary with court. See *Trial*, 2.

Impeaching. See *Larceny*, 1.

See *Criminal Law*, 3.

**WRIT OF ASSISTANCE.** See *Mortgages*, 5.

**WRONGFUL DIVERSION.**

Defenses; tenancy or license no defense, where terminated by defendant's wrongful acts. See *Irrigation*, 5.

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